

# **THE CROC WITHOUT BITE?**

An evaluation of whether a complaints procedure will give the  
Convention on the Rights of the Child its bite



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## Declaration

I declare that this thesis is less than 20,000 words in length, and that the work contained in this thesis has not been submitted for a higher degree at any other university or institution.

## Acknowledgements

The idea to research a possible optional protocol to the Convention on the Rights of the Child facilitating individual complaints was inspired by a fellow researcher at the Norwegian Centre for Human Rights, Malcolm Langford. I began researching the early advocacy for such a protocol back in August 2009, when the process was still in the early stages of its infancy. I am grateful to Malcolm for being a springboard of ideas and critically engaging with mine. Malcolm and I presented our initial ideas and research at the seminar entitled, ‘The Economic Rights of the Girl Child,’ which was hosted by the Norwegian Ministry of Foreign Affairs, Plan Norway and the Norwegian Centre for Human Rights on 24 September 2009. Furthermore, in February this year, we contributed with a Working Paper to the seminar entitled, ‘Should Norway Support a Complaint Procedure for the Convention on the Rights of the Child?’ thereby triggering the discussion in the Norwegian context with the Norwegian Ministry of Foreign Affairs, *Regjeringsadvokaten* (the Norwegian Attorney General’s Office) and Redd Barna.

The work presented herein is all my own, except where references are used in the text. No special ethical approvals were required.

18 May 2010

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“Our whole life is but a greater and longer childhood.”

Benjamin Franklin

“There is a garden in every childhood, an enchanted place where colors are brighter, the  
air softer, and the morning more fragrant than ever again.”

Elizabeth Lawrence

For my children

# 1 Introduction

## 1.1 It takes a village

Whilst human communities in our post-modern, post-industrial age have demonstrably changed, the principle famously espoused by this African proverb remains the same: indeed, it may be stated that it takes an international community to raise a child – restricted not only to the parents or the state. Do children have *moral* rights as well as the *positive* rights recognised in international human rights law; and if so, who are the duty-bearers towards children, are only a couple of the questions which are considerably debated in studies of children. Not surprisingly perhaps, international human rights discourse and practice are not immune to such tensions. Children's human rights represent a new – and still contested – development in the broader field of post-Second World War international human rights. This thesis considers the ways that the international *human rights* framework has been applied to children, specifically through an analysis of the need for an optional protocol to the Convention on the Rights of the Child (CRC)<sup>1</sup>. I begin by considering the philosophical underpinnings and justifications for children's *moral* rights, in order to apply them to their *human rights* with a view to strengthening the basis from which a claim for a complaints procedure can be made. More than almost any other domain of rights, children's rights have been hotspots for debates about the existence of and nature of rights. Addressing the extension of human rights frameworks to children thus raises wide-ranging questions about rights, including: debates about paternalism; 'will' or 'choice' versus 'interest' theories; and the extent to which such issues are effectively addressed or resolved in international human rights law and practice. James Nickel's nonconsequentialist framework for justifying *human rights* will then be applied as an alternative way of grounding the rights of children in the context of international human rights specifically.

I then proceed to survey the field of *international* human rights law, to examine the extent to which children's rights are effectively protected by the treaty bodies, followed by an

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<sup>1</sup> I used the acronym "CROC" in the title for rhetorical purposes, but "CRC" or "The Convention" will henceforth be used.

analysis of the CRC as the concrete expression of the rights of children in the international legal framework. I will examine the effectiveness of the CRC through the lens of the need for a complaints mechanism, facilitated by a third optional protocol to the Convention. Here, the added value and assumptions of individual complaints procedures will be evaluated and applied to children. Comparison will be made to the Optional Protocol to the Convention on the Elimination of all forms of Discrimination Against Women (OP-CEDAW): its history and justifications.

These considerations are highly pertinent given the decision by the Human Rights Council (HRC) in March, to extend the mandate of the intergovernmental Working Group to begin drafting an optional protocol. The first session of the Working Group is expected to take place in December 2010 and the new instrument could be adopted by the end of 2011. This thesis provides a critical background for academics, practitioners and diplomats to contribute to the process of the drafting of an optional protocol to the CRC and thus speaks to the reasons states should ratify such an instrument.

“The United Nations Convention on the Rights of the Child was, at its adoption, a pioneering global treaty embracing the full range of human rights – civil, political, economic, social and cultural – in one treaty with a unified monitoring body.”<sup>2</sup> In its provision of socio-economic rights to children, it recognised and reaffirmed the interdependence and indivisibility of rights, before its express acknowledgment in the Vienna Declaration and Program of Action in 1993. The CRC is extraordinarily comprehensive in its scope, and “[b]y its genesis, scope, content and very existence, this Convention ranks as a landmark in efforts on behalf of children.”<sup>3</sup> Despite its landmark beginning, it is now the only international human rights treaty with a mandatory reporting

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<sup>2</sup> Geraldine Van Bueren, 'Committee on the Rights of the Child: Overcoming Inertia in This Age of No Alternatives', in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008), 569-87.

<sup>3</sup> Sharon Detrick, Jaap Doek, and Nigel Cantwell, *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (Dordrecht: M. Nijhoff, 1992) at 27.

procedure which does not have, in addition, an existing or draft communications procedure.<sup>4</sup> This has been seen by some to be a serious shortcoming of the human rights mechanisms of the treaty bodies more generally, being discriminatory against children. In this thesis I explore the issue as to whether there is a need for an optional protocol (OP) to the CRC whereby individual children have standing to bring a complaint before the Committee on the Rights of the Child (CRC Committee). As pioneering as an international human rights bestowing instrument as the CRC was, back in the 1990s, the very real question as to its effectiveness in 2010 begs to be addressed. The rights of children are still flagrantly abused the world over, often without effective national avenues through which children can seek redress for their violated rights. Though technically, as individuals, children can seek redress for any alleged breaches under the various core international human rights conventions, their actual use of this system is exceptionally limited. Even then, the breach of any one of the full scope of rights encapsulated in the CRC, which are unique to this child-specific instrument, such as the right to play and the right to protection and abuse, are not capable of adjudication by any one of the committees of the other core international human rights instruments.

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<sup>4</sup> At present, five of the human rights treaty bodies (CERD, CCPR, CAT, CEDAW and CRPD) may under particular circumstances, consider communications from individuals alleging violations of their rights under the respective treaties. Some of them can undertake inquiries in cases of grave or systematic violations of the treaty in question (CAT, CEDAW, and CRPD).

The Convention on Migrant Workers also contains a provision allowing individual communications to be considered by the CMW. This provision will become operative when ten States parties have made the necessary declaration under Article 77.

Two instruments, which have not yet entered into force: the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* and the *International Convention for the Protection of All Persons from Enforced Disappearances*, also provide for the examination of individual complaints.



## 2 Sources and Methodology

The methodology I employ in my thesis is a combination of legal, philosophical and political. I begin with an analysis of moral rights philosophies in the broader fields of philosophy, in order to compare it to the more specific framework of the philosophy of international human rights. Here, I apply the Four Secure Claims as espoused by James Nickel, to children, in order to ground children's rights in the international human rights context. I interpret and apply these claims to children in light of the philosophical literature that I survey. In doing so, my purpose is two-fold: firstly, in the hope that such research strengthens the basis from which a claim for a complaints mechanism to the CRC can be made, and secondly, informed by the belief that an understanding of the philosophy of children's rights can thwart the further ad hoc development of international human rights law concerning children. It would be "idle to pretend that the answer to all this lies in theory [...] [b]ut we can and must believe that the state of childhood will be improved if we [...] transcend the rhetoric of international documents and domestic legislation and tease out the moral argument for the recognition of children's rights."<sup>5</sup>

The legal analysis in my thesis stems from my survey of international children's rights cases from three of the United Nations treaty bodies: the Human Rights Committee, the CEDAW Committee and the CERD Committee respectively. Here, I analysed all of the cases brought before each of the respective committees, concerning children: either brought by, or on behalf of children themselves. I present my findings in the sixth chapter of this thesis and interpret the need for a third optional protocol to the CRC in light of these conclusions.

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<sup>5</sup> Michael Freeman, 'Taking Children's Rights More Seriously', in Philip Alston (ed.), *Children, Rights, and the Law* (London: Clarendon, 1992), 52-71 at 53.

The political aspect of my methodology is reflected by the subject matter chosen – the policy-driven nature of such an endeavour – and the related sources. That is to say, the drafting of an optional protocol – as an international human rights treaty – is a manifestly political one, initiated, drafted, signed and ratified by states. I have sought not to lose sight of this diplomatic, pragmatic nature of the topic that I have chosen and the reality that in the end, it is the ‘state’ that will ensure its success and political clout. Consequently, I examine sources related to the United Nations treaty bodies in order to discuss the pros and cons of an optional protocol, based on a comparison with the CEDAW and the arguments that the working groups have themselves discussed.

### 3 Philosophies of Children's Rights

#### 3.1 Philosophies of *rights* and children

##### 3.1.1 Overview

Although the CRC accords to children a wide range of positive rights, this does not translate into 'moral' rights. The fact that children have positive rights – as enshrined in international human rights instruments, for example – does not settle the question of whether they do or should have moral rights. Indeed, the idea of children as rights holders (of what kinds, if any at all) has been subject to different kinds of philosophical criticism and the various debates shed light on both the nature and purpose of rights, and on the moral status of children. It is to this that I now turn in order to humbly bridge the “unfortunate disjunction between theory and practice,” as the [i]deas of the theorists can obviously be of more practical assistance if translated into a set of legal principles which provides clear guidance over the extent to which children's rights can be fulfilled.”<sup>6</sup> It is hoped that it is with a clearer understanding of the nuances of children's rights that the OP to CRC is drafted so as to ensure its effectiveness.

“It has become of particular importance now that all those concerned with the principles of child law must come to terms with the fact that children are important rights-holders under the CRC [...]. Indeed, without a clearer understanding of rights theory, there is a risk that children's challenges will be dealt with on an ad hoc basis and in an increasingly confused and inconsistent manner.”<sup>7</sup>

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<sup>6</sup> Jane Fortin, *Children's Rights and the Developing Law* (Cambridge: Cambridge University Press, 2009) at 29.

<sup>7</sup> Ibid. at 29-30.

It was Karen Engle who famously wrote that the “international law of human rights has been built largely by its own criticism;”<sup>8</sup> however, paradoxically at the same time it has for the most part managed to escape the critique of rights that have been levelled at moral rights theorists.<sup>9</sup> Moral rights theorists have enunciated many theories as to the nature of rights, and its implications for children: namely, whether children can be described as rights-holders at all. *Liberationalist* ideas, which had developed in the civil rights context of 1960s America, provide a good backdrop of arguments about children’s rights: emphasising self-determination by granting autonomy to the child to the same extent as that of adults. Many have critiqued the *liberationalist* “failure to accord sufficient attention to the physical and mental differences between childhood and adulthood”<sup>10</sup> and this has led to a strong response in children’s rights theory.

### 3.1.2 Choice, Interest and Autonomy

Definitions of *rights* themselves have had implications upon whether children can be described as rights-holders, and the concept of ‘choice’ lies at the epicentre of the differences between the two main contenders: ‘*choice*’ (or ‘*will*’) theory on the one hand, and ‘*interest*’ theory on the other. According to the former, people can only be described as rights-holders if they can exercise a choice over a given right; this theory “invests the importance of choice with such significance that it alone is capable of grounding all rights.”<sup>11</sup> The implications of this seem obvious enough for children: children who are too young to choose and therefore claim rights, simply do not have rights. Interest theorists on the other hand, such as MacCormick and Raz, respond with a competing view of rights uncoupling the centrality of choice from rights, arguing that the cart should not be placed before the horse as “rights need not be confined to those who can lay claim to or waive

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<sup>8</sup> Karen Engle, 'International Human Rights and Feminism: When Discourses Meet', *Michigan Journal of International Law*, 13 (1991-2) at 519-20.

<sup>9</sup> Ibid.

<sup>10</sup> Fortin, *Children's Rights and the Developing Law* at 4.

<sup>11</sup> Ibid. at 12.

them [...] posit[ing] that a person has a right where his *interests* are protected in certain ways.”<sup>12</sup> Children, like adults, have interests that need to be protected and such a rights-model “fully accommodates the “view that children are no less precious because of their lack of adult capacities.”<sup>13</sup> In her vast account of the theoretical perspectives, Fortin expresses her preference for the interest model as put forward by MacCormick, who describes a moral right as “a good of such importance that it would be wrong to deny it to or withhold it from any member of C (a given class)” due to its “arresting simplicity that many non-theorists may find attractive.”<sup>14</sup> However, Fortin has also demonstrated this theory’s drawbacks, that it does not effectively delineate which interests are capable of translating into rights,<sup>15</sup> which goes to suggest that “agreement over a universally acceptable theory of rights for dependent children may always prove elusive.”<sup>16</sup>

Like choice, the question of autonomy has been at the heart of the theories of children’s rights, going back to the critiques of liberalist ideas who granted autonomy with utmost importance and centrality. Is a child capable of exercising autonomy and to what extent have plagued rights theories and critics thereof. The flip-side of the autonomy coin is the need to restrict the autonomy of children, otherwise known as paternalism. Raz, a theorist of the *interest* persuasion does not think these two are mutually exclusive and suggests that “it may be necessary to protect someone else, or to protect the coerced person’s own long-term autonomy, or some other interest.”<sup>17</sup> This has direct implications for the CRC and the underlying principles of a potential OP. That the CRC employs the use of a paternalistic welfare principle: the “best interests of the child” indicates that, already in international

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<sup>12</sup> Ibid. at 13.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid. at 14.

<sup>15</sup> Ibid. at 15-17.

<sup>16</sup> Ibid. at 14.

<sup>17</sup> Ibid. at 21.

human rights law paternalism is considered as the appropriate way of addressing children. However, this does not negate criticism of its use, and the need to restrain paternalistic interventions is most lucidly expressed by Eekelaar in his seminal article.<sup>18</sup> Eekelaar expresses concern at the indeterminacy of its use by the courts and proposes another method of decision-making to replace the best interests test, what he calls the concept of “dynamic self-determinism.” According to this method (which is a “reconstruction of the ‘best interests’ principle”) the *objectivity* from which the best interests of the child (as a principle) is determined<sup>19</sup> needs to be supplemented with an additional element. These “two modes, should operate in parallel,”<sup>20</sup> such that accordingly, the presumption of a what is in a child’s best interests is shifted from the decision-maker to the child: the “presumption is that the best response to whatever issue has arisen may lie within the child, even though the child may need direction to an accommodation with the social world surrounding it, rather than a manipulation of that social world to which that child is left to respond.”<sup>21</sup> Rather than being only one of a number of other competing considerations, a child’s views of what are in her own interests would instead be an important factor that must be considered. This exercise of autonomy is dependent upon the child’s competence, as acknowledged by Eekelaar; however, this new principle is not immune to potential misinterpretation as an issue may arise when “such views might suggest to some that sympathy with the concept that children are rights-holders dictates an inability to override children’s wishes, because doing so thereby undermines their rights.”<sup>22</sup>

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<sup>18</sup> John Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism', in Philip Alston (ed.), *The Best Interests of the Child: Reconciling Culture and Human Rights* (Oxford: Oxford University Press, 1994), 42-61.

<sup>19</sup> Ibid. at 46-7. “By this method, the decision-maker draws on beliefs which indicate conditions which are deemed to be in the child’s interests [...] one should not therefore dismiss lightly the possibility of making objective assessments of children’s interests. But their reliability is difficult to determine...It is therefore necessary to introduce a second element into the decision-making process.”

<sup>20</sup> Ibid. at 58.

<sup>21</sup> Ibid.

<sup>22</sup> Fortin, *Children's Rights and the Developing Law* at 24.

It would seem that the doctrinal confusion concerning vesting children with moral rights has not seeped its way into the international human rights paradigm, at least not to the same extent. Although there appears to be a disconnect between moral theories of children's rights (philosophies of children's rights) and the instruments detailing children's human rights, it does not seem as self-aware.<sup>23</sup> Jane Fortin, Professor of law who has published extensively in children's rights, has addressed the two differing frameworks, to argue that this is positive – that where children's rights theorists may fail, recourse may be had to the 'rhetoric' of human rights, where the contested rights may be easily derived from existing instruments. For Fortin, international human rights can be seen then as a more pragmatic way of advancing the interests and rights of children, where "the language or 'rhetoric' of rights is a politically useful tool to ensure the achievement of certain goals for children,"<sup>24</sup> allowing one to sidestep the obstacles posed in the realm of moral philosophy. The moral theorists working from within that said paradigm are not however considered in Fortin's study, due perhaps in part to the fact that they do not deal specifically with children. This absence of engagement with the theory within the framework of human rights can however, be debilitating, leading to an ad hoc accommodation of children within the system of protection. What is needed, I would submit, are both approaches: clear justifications of the moral rights of children are a much-needed supplement to the deduction (or often mere assumption) of the existence of such moral rights from the legal instruments.<sup>25</sup>

Thus, the justification of rights in the domain of international human rights it operates in antithetically to the methodology of the moral rights theorists: where moral rights are derived from the legal principles, as opposed to deriving the latter from the moral

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<sup>23</sup> This can be seen in the human rights theorists, such as James Nickel and Rawls, whose theories do not specifically address children, but take an adult-centric approach.

<sup>24</sup> Fortin, *Children's Rights and the Developing Law* at 17.

<sup>25</sup> I propose to bridge this gap in theory by applying such a theory (here Nickel's) to children, to test whether it can accommodate children.

principles (as is the case in the realm of moral rights theories). An apt descriptive term of this process is ‘doctrinalism’ – of deducing the rights from the instruments – within human rights discourse, which is employed as a persuasive tool to ground and justify the rights of groups, as articulated by Karen Engle. Although Engle speaks with reference to women, this methodology can be seamlessly applied to children:

Doctrinalists focus most of their efforts on interpreting international legal provisions so as to guarantee the particular rights they advocate. In attempting to prove the guarantee of certain rights in positive law, many of these advocates follow a method of overkill: the more documents from which they can derive a right, the more likely its existence seems. Although this method is quite common in public international law, its manifestation in [children]’s human rights advocacy reflects a question about whether to pursue the ‘human rights of [children],’ through an appeal to universal human rights law, or to pursue ‘[children]’s rights,’ through a more specific appeal to law that seems particular to [children]’s situation. Whether advocates are attempting to achieve the ‘human rights of [children]’ or ‘[children]’s rights’ is a recurring theme throughout [children]’s human rights advocacy.<sup>26</sup>

Moving from the general rights framework then to the human rights paradigm, the philosophies attempting to ground human rights within the core of this system, so to speak, will be scrutinised. The extent to which children are accommodated in this system will be considered.

## 3.2 Philosophies of *human rights* and children

### 3.2.1 Introduction

Jacques Maritain, a member of the UNESCO Committee on the Theoretical Bases of human Rights reflected a colleague’s remark that “we agree about the nature of rights *but on condition that no one asks us why.*”<sup>27</sup> This neatly sums up the current state of children’s rights in the international human rights framework. Not being riddled by the same philosophical issues, as “[t]he jurisprudential doubts underlying the existence and scope of children’s rights did not inhibit the efforts of those seeking to promote children’s protection

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<sup>26</sup> I have replaced “women” with children in this quote, for emphasis.

<sup>27</sup> As quoted in Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009).



in an international context,”<sup>28</sup> one can say that in the international human rights context, children *do* have rights, as bestowed by the relevant legal instruments, but the issue of ‘upon what basis’ does not seem to have been adequately explored. Discussions of the existence of children’s rights seem to take place within the more general rights paradigm, as evidenced in Section 3.1 above, which does not necessarily directly transfer to the international human rights framework. In this second framework, theorists have attempted to ground human rights philosophically in order to strengthen their claim and to make them more sustainable. Indeed “had it not been for the driving force of international human rights lawyers, ideas and theories about children’s rights might have remained in the realms of intellectual speculation. At first sight, the academics and legal practitioners concerned with the field of international human rights appear to be interested in entirely different concepts from the pure rights theories which concern the moral philosophers and jurists.”<sup>29</sup> As argued by Fortin, the differences between the two paradigms are “more apparent than real,” being “exacerbated by the different language they employ,” and each has influenced the other. Nickel comments on the influence that the human rights movement has had on moral theories, that it “has reflected – and perhaps even led – the expansion in the use of the idea of rights with moral and political discourse.”<sup>30</sup>

### 3.2.2 Making Sense of Children’s Rights

Borrowing from the title of James Nickel’s book, I now apply Nickel’s nonconsequentialist framework for justifying human rights to children, to strengthen the basis from which an individual complaints procedure can be made. Nickel provides an ethical<sup>31</sup> justification of human rights, defending a pluralistic conception of essential human interests<sup>32</sup> “in order to

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<sup>28</sup> Fortin, *Children’s Rights and the Developing Law* at 34.

<sup>29</sup> Ibid.

<sup>30</sup> James W. Nickel, *Making Sense of Human Rights* (Malden, Mass.: Blackwell Publishing, 2007) at 96.

<sup>31</sup> “Ethical” due to the fact that this view is informed by a substantive notion of the good.

<sup>32</sup> As opposed to other ethical philosophies, such as that of James Griffin, who argues that core values such as autonomy and liberty are essential to what it means to be a “functioning human agent” and that rights can be derived from the basic interests people have in realising these values: Griffin, 35.

give human rights greater power to resist folding when applied in nonstandard circumstances”<sup>33</sup> and normative weight.

### 3.2.2.1 Four Secure Claims

If children cannot be neatly accommodated in a “modest”<sup>34</sup> theory of justification of human rights – in what is prescribed as a “secure floor”, the minimal standards to lead a good life – the prognosis would seem somewhat disconcerting. Nickel’s test does not on the face of it directly apply to children; he makes mention of children as minorities, where he proposes a different (arguably more demanding) test<sup>35</sup> whereby each minority right has to be derived from another universally accepted human right in order to be a valid human right.<sup>36</sup>

However, as I will try to demonstrate, children fit nicely within the general framework proposed by Nickel, even if not directly intended by Nickel to apply to children. Nickel proposes a Four Secure Claims model as a lowest common denominator justification for the existence of human rights. In theory, this test should also apply to children, if they are to be considered as equal rights holders in the international framework for the protection of human rights.

Nickel’s proposed deontological moral considerations from which he builds his framework of justification – his Four Secure<sup>37</sup> Claims – will now each be considered and applied to children’s rights generally. I use Nickel’s justificatory test to argue that children’s rights are human rights.

- (i) A secure claim to have a life:

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<sup>33</sup> Nickel, *Making Sense of Human Rights* at 61.

<sup>34</sup> *Ibid.* at 62.

<sup>35</sup> *Ibid.* at 163.

<sup>36</sup> Though he states that are an “odd minority” Nickel claims that minority rights “fit into the family of human rights and can be supported by the same considerations that support human rights generally” in *Ibid.* at 160 -1.

<sup>37</sup> These four abstract rights are “secure” in two ways: they “do not have to be earned through membership or good behaviour” and their “availability to a person does not depend on that person’s ability to generate utility or other good consequences” in *Ibid.* at 62.

- (ii) A secure claim to lead one's life;
- (iii) A secure claim against severely cruel or degrading treatment; and
- (iv) A secure claim against severely unfair treatment.

### 3.2.2.2 *Security of life and liberty*

The claim to have a life – to the “central human interest in security against actions of others that lead to one's death or loss of health”<sup>38</sup> – applies to children. This first claim is not dependent on the autonomy of the individual, and therefore does not bring into question its applicability to children, with respect to issues surrounding their will, choice or autonomy. Indeed, their inability to protect themselves when quite young may even provide a stronger reasoning from which to ground children's rights, as this claim includes the negative duties implied above, but also the positive duty “to assist people when they need help in protecting themselves against threats of murder and violence.”<sup>39</sup> Children possess this claim just as much, if not to a greater degree in infancy, than adults. Further, this claim requires more than just being free from violence and harm. It includes having a body that is capable of “self-supply” of the basic necessities: food, water, sleep and shelter. It is when there are periods where self-supply is impossible, “typically childhood, illness, unemployment, disability and advanced old age” that a person (here the child) has a claim upon others to assistance.<sup>40</sup>

### 3.2.2.3 *Leading one's life*

Unlike the first claim, the claim to leading one's life harks back to the ongoing debate in children's rights theories between choice/will and interest, autonomy, and agency. Nickel proceeds by reflecting these very assumptions, that “[n]ormal adults are autonomous agents, and put a great value on continuing to be such. They evaluate, choose, deliberate, and plan.” *Prima facie*, this does not include children or operates to exclude them, as

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<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid. at 63.

demonstrated by the proviso, “normal adults.” Nickel then continues by linking autonomy with liberty, it having both negative and positive aspects: “[...] yields claims to freedoms from slavery, servitude, and the use of one’s life, time, or body without one’s consent. It also yields claims to liberties in the most important areas of *choice* such as occupation, marriage, association, movement and belief.”<sup>41</sup> Can children make such choices, in these important matters, recalls the arguments in children’s rights philosophies, reflecting the ‘choice’ or ‘will’ theory of rights. In grappling with the role of autonomy, the various theoretical rights models give it differing weight, with one theorist indicating that “whilst a child’s capacity to plan and choose develops gradually, the choice theory seems to ‘commit us to the view that, prior to the acquisition of choosing skills, children have no rights’.”<sup>42</sup> According to this theorist, no respite is offered by ‘interest’ theories either, this being an argument considered by Fortin as weak in that children also have an *interest* in choice, and ‘interest’ theories such as that of MacCormick can adequately accommodate children: “[b]ut surely this overlooks the fact that the interest theory of rights itself accommodates such a proposition, since children may indeed gradually acquire rights to self-determination based on their interest *in* choice, without having a right to complete autonomy.”<sup>43</sup> There are echoes of this in Nickel’s acknowledgment that a secure claim to liberty is “not just a claim to respect for or noninterference with one’s liberty. It is also a claim *to assistance* in protecting one’s liberty, and for the creation and maintenance of social conditions in which the *capacity for agency* can be developed and exercised.”<sup>44</sup> Here, this claim fits the bill for children, reflecting Freeman’s formula – his notion of the “capacity for autonomy”, where he suggests the need for objective limits placed on a child’s autonomy – hence the notion of “liberal paternalism” which is his important contribution:

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<sup>41</sup> Ibid. (emphasis added).

<sup>42</sup> S. Brennan as quoted in Fortin, *Children's Rights and the Developing Law* at 20.

<sup>43</sup> Ibid.

<sup>44</sup> Nickel, *Making Sense of Human Rights* at 64 (emphasis added).

The question we should ask ourselves is this: what sorts of action or conduct would we wish, as children, to be shielded against on the assumption that we would want to mature to a rationally autonomous adulthood and be capable of deciding on our own system of ends as free and rational beings.<sup>45</sup>

Thus, children, like adults, need the creation of spaces where their capacity for autonomy can be realised and can validly claim the right to lead their lives.

#### 3.2.2.4 *Cruelty*

The secure claim against severely cruel or degrading treatment includes all forms of cruelty, from its simplest form imposing “severe pain on another person thoughtlessly or gleefully” thereby degrading a person, to more complicated forms that are “calculated to degrade a person by suggesting, or bringing it about, that she is something that she and others will think base or low.”<sup>46</sup> There is no reason why this cannot be justly claimed by children, who are more vulnerable to abuse or cruel treatment by virtue of their age and dependence.

#### 3.2.2.5 *Unfair treatment*

Children as human beings are “keenly attuned to unfairness,” just as adults, and therefore have just as much a claim to not being subject to severe unfairness. Children therefore also have a claim against severely unfair treatment, to the freedom from such treatment and a claim to individual and collective efforts to protection against it. If as stated by Nickel, the “claim against unfair treatment plays an important role in supporting the universality of human rights, “ then there is especially strong arguments in favour of applying it to children.

### 3.2.3 Conclusion

Although not written specifically with children in mind, James Nickel’s justificatory test for the existence of human rights can quite easily apply to children. This is only one of

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<sup>45</sup> Freeman, 'Taking Children's Rights More Seriously', at 67.

<sup>46</sup> Nickel, *Making Sense of Human Rights* at 65.

many competing justificatory theories within human rights discourse, yet I would venture to say that children may just as easily be situated within the parameters of other similar theories. Taking children's rights more seriously, as argued by Freeman and others, will lead to a betterment in children's lives and contribute to their more effective representation in the international system of human rights protection. Standing firmly on reasoned and justifiable rights can only improve this engagement more generally, and contribute more specifically to a sharpened tool of an optional protocol to the CRC facilitating individual complaints.

## 4 Assessing the Need for an Optional Protocol

### 4.1 *Travaux Préparatoires* of the Convention on the Rights of the Child

The formal proposal to the UN that it adopt a convention on the rights of the child was tabled by the Government of Poland at the thirty-fourth session of the UN Commission on Human Rights (the predecessor to the Human Rights Council), in early 1978. It was not met with optimism, as indeed:

[...] when the U.N. Secretary-General circulated the proposal to governments and international organisations for their ‘voices, observations and suggestions’, the response was anything but enthusiastic. Whilst few felt able officially to express doubts about the need for better ensuring access of children their fundamental rights – although many unofficially questioned the opportuneness of a convention in doing so – they did raised several concerns regarding the proposal as it stood.<sup>47</sup>

Thus, by the time that the UN Commission on Human Rights met for its thirty-fifth session and decided to set-up an open-ended working group, it was with the view that the existing draft needed very close examination and much modification – not achievable by the time for the adoption of the Convention in 1979. The drafting of the CRC took place over a period of ten years, and the consensual nature of the proceedings can be seen to contribute to this lengthy process. On the other hand, this same factor contributed to the ultimate success of the Convention, upon completion. The CRC boasts record-breaking rates of ratification with “no other United Nations human rights treaty [having] entered into force

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<sup>47</sup> Detrick, Doek, and Cantwell, *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* at 21.

so quickly and been ratified by so many states in such a short period of time.”<sup>48</sup> The Working Group operated on the basis of consensus, which means that “At no time during its work ... was a proposal taken to a vote.”<sup>49</sup> As highlighted by one particular commentator, and noted by the Secretary-General at the time, there was a “spirit of great co-operation not only amongst the non-governmental organizations but also among states’ during the drafting stages of the CRC, to the extent that ‘a great number of state representatives became more involved with the subject of the treaty than is the norm.’”<sup>50</sup>

This lowest common denominator approach of adopting each provision by consensus can perhaps be one reason that accounts for the CRC’s unprecedented ratification rate by States. Conversely, the need for fostering such a positive atmosphere was identified by a couple of scholars as being precisely the reason against having a complaints procedure attached to the CRC; the Committee was limited to a monitoring procedure, which was based on “the idea of mutual help, support and co-operation.”<sup>51</sup> The authors seem to fear the ‘over-judicialisation’ of the Committee’s powers, by arguing that the “Committee that was founded for this purpose does not only act in a controlling way but also in an advising way,” not being mindful of the status of the Committee’s findings as “views” or expressions of opinion as opposed to binding legal rulings.

Non-governmental organizations (NGOs) also account for the success, as pointed out by one commentator: “in addition to engaging in the traditional lobbying activities of trying to secure the inclusion of specific provisions in the convention, the Ad Hoc Group did a great

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<sup>48</sup> Lawrence J. Leblanc, *The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights* (Lincoln, Neb.: University of Nebraska Press, 1995). at 45.

<sup>49</sup> Detrick, Doek, and Cantwell, *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* at 22.

<sup>50</sup> Geraldine Van Bueren, *The International Law on the Rights of the Child* (Dordrecht: Martinus Nijhoff, 1995) at 388.

<sup>51</sup> Johan Vande Lanotte and Geert Goedertier, 'Monitoring Human Rights: Formal and Procedural Aspects', in Eugene Verhellen (ed.), *Monitoring Children's Rights* (The Hague: Martinus Nijhoff, 1996) at 82.



deal to stimulate awareness of the work that was being done on the draft convention.” The NGOs, represented by an Ad Hoc Group, organized and participated in many activities which “helped to make the convention become perhaps better known than many other specialized human rights instruments, and they probably also had a impact so far as its rapid ratification is concerned.”<sup>52</sup> This influence also contributed to the substantive content of the CRC; the Ad Hoc NGO Group being able to identify more than thirteen substantive articles where they had “made a significant impact on the formulation, form or content. It was the breadth of expertise on which the NGO Group could draw, combined with its cohesion and careful preparation, that largely explains how it had an impact in so many of the fields covered by this unusually comprehensive treaty.”<sup>53</sup>

However, despite attempts by the NGO Ad Hoc Group on the CRC which attempted to persuade states of the advantages of an individual petition system, the implementation mechanism adopted – that of a reporting procedure – did not include a communication/complaint procedure. Due to this ‘lack of state support the proposals were never formally tabled and discussed in the sessions of the Working Group.’<sup>54</sup> Undoubtedly, this was not the final word on the matter and there was nothing to prevent the re-emergence of the campaign for an optional protocol allowing for individual complaints to the CRC.

## 4.2 Alternative Proposals?

One commentator calls for the appointment of a Special Rapporteur for the Girl-Child, in response to the marginalisation of the girl-child in international human rights law, who can expedite the process and promotion of an ongoing intersectional approach that facilitates

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<sup>52</sup> Leblanc, *The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights* at 43.

<sup>53</sup> Detrick, Doek, and Cantwell, *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* at 25.

<sup>54</sup> Van Bueren, *The International Law on the Rights of the Child* at 389.

girls' inclusion in international human rights law.<sup>55</sup> Although focussing specifically on the girl child, Taefi's analysis highlights what is seen to be a significant shortcoming of the current system of children's rights protection. Namely, that although children are covered by a number of treaties and treaty bodies (in this case, the CRC is juxtaposed with CEDAW respectively) neither one, argues the author, captures the unique positioning of marginalised children (here, girls) in international human rights law. No suggestion is offered here for an OP to CRC, however, the utility of an OP in advancing the rights of women is acknowledged: "The creation of a separate convention for women led to formal recognition of violence against women as a human rights issue at the Vienna World Conference in 1993 [...] This impelled the acceptance of the indivisibility of human rights for women and led to the creation of separate enforcement mechanisms, such as the Optional Protocol to CEDAW which adds an individual right of petition (Article 7(4))".<sup>56</sup> There is no reason why the same development should not occur in the context of children's rights.

### 4.3 What is the Added Value of an Optional Protocol?

#### 4.3.1 Introduction

The added value of yet another treaty, in the form of an OP, is pertinent in deliberations for an OP to the CRC. Does treaty-ratification improve state behaviour? According to Dimitrijevic there are a number of possible limitations of the individual complaints procedure, including that states take a reluctant stance against them (this view being undermined by their common status);<sup>57</sup> that human rights are violated by individuals or

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<sup>55</sup> Nura Taefi, 'The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child', *The International Journal of Children's Rights*, 17 (2009), 345-76.

<sup>56</sup> Ibid.

<sup>57</sup> Vojin Dimitrijevic, 'The Monitoring of Human Rights and the Prevention of Human Rights Violations through Reporting Procedures', in Arie Bloed et al. (eds.), *Monitoring Human Rights in Europe: Comparing International Procedures and Mechanisms* (Dordrecht: M. Nijhoff in co-operation with the International Helsinki Federation for Human Rights, 1993), 1-24.. This article was published in 1993 and there has been an evolution in the international protection of human rights since.

groups of individuals and not states; and that they can never cover the entire range of human rights:

A modern human rights treaty aims at a generally favourable human rights situation, which includes creating the necessary conditions for the enjoyment of human rights and the elimination of factors that lead to violations. If a state is remiss, this very often cannot be related to an individual “victim” such as, for instance, when the cost of human life becomes low due to disease [...] and other circumstances and the right to life is thus threatened and violated.<sup>58</sup>

The latter two arguments appear to misconstrue the nature and purpose of the international system of human rights protection. Firstly, they pit the individual against the state (indeed this is precisely their post-Second-World-War innovation to international law – this “subversive” quality undercutting international law and state sovereignty, so termed by Antonio Cassese); here, it is irrelevant whether the violation can be directly attributed to the state, or to the failure of the state in protecting individuals from harm. The very notion of human rights arms individuals – as *victims* and the *subjects* of international human rights as seen in the Universal Declaration of Human Rights – with the double-edged sword of the persuasive discourse of the language of human rights, and its associated machinery of redress.

Empirical studies of the effects of treaty-ratification suggest antithetical views. In the first empirical test of the hypothesis that becoming a party to an international human rights agreement (specifically, the International Covenant of Civil and Political Rights and its Optional Protocol) makes a difference in states’ actual behaviour, Keith’s findings suggest that overall “perhaps it may be overly optimistic to expect that being a party to this international covenant will produce an observable impact. The results are consistent with the assertions that the treaty’s implementation mechanisms are too weak and rely too much upon the goodwill of the party state to effect observable change in actual human rights

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<sup>58</sup> As quoted in Lanotte and Goedertier, 'Monitoring Human Rights: Formal and Procedural Aspects', at 103.

behavior.”<sup>59</sup> In her 2002 “large-scale” quantitative analysis of the relationship between human rights treaties and countries' human rights practices, Oona Hathaway offers a sweeping survey “encompassing the experiences of 166 nations over a nearly forty-year period in five areas of human rights law: genocide, torture, fair and public trials, civil liberties, and political representation of women”. In her study, Hathaway provides an “empirical window” through which she examines two separate but related questions: of whether countries comply with the requirements of the human rights treaties they have joined and secondly, whether these human rights treaties appear to be effective in improving countries' human rights practices. Hathaway’s analysis is not so positive; she finds that:

[...] based on the present analysis, ratification of the treaties by individual countries appears more likely to offset pressure for change in human rights practices than to augment it. The solution to this dilemma is not the abandonment of human rights treaties, but a renewed effort to enhance the monitoring and enforcement of treaty obligations to reduce opportunities for countries to use ratification as a symbolic substitute for real improvements in their citizens' lives.<sup>60</sup>

So we are not to throw the baby out with the bathwater. Hathaway’s study serves to demonstrate the need to balance this discrepancy – what she perceives as the tension between the three ‘expressive roles’ of treaty signature ratification and implementation: legal, political, and social, the third being defined as follows:

Yet treaties also have an expressive function that arises from what membership in a treaty regime *says about the parties to the treaties*. When a country joins a human rights treaty, it engages in what might be called ‘position taking,’ defined here as the public enunciation of a statement on anything likely to be of interest to domestic or international actors. In this sense, the ratification of a treaty functions much as a roll-call vote in the U.S. Congress or a speech in favour of the temperance movement, as a pleasing statement not necessarily intended to have any real effect on outcomes. It

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<sup>59</sup> Linda Camp Keith, 'The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?', *Journal of Peace Research*, 36/1 (January 1, 1999-1999), 95-118 at 113.

<sup>60</sup> Oona A. Hathaway, 'Do Human Rights Treaties Make a Difference?', *Yale Law Journal*, 111 (2001-2002) at 2025.

declares to the world that the principles outlined in the treaty are consistent with the ratifying government's commitment to human rights.”<sup>61</sup>

The rhetorical, ‘expressive’ value of treaty signing and ratification is not one that is expressly acknowledged by states in diplomatic deliberations, but one that is likely to play a significant role in the later signature and ratification of the drafted OP to the CRC. If her diagnosis is bleak, Hathaway’s prognosis offers more promise in her insistence that if the process is to be successful, the disconnect between the *expressive* value and the *instrumental value* of treaty-making should be eliminated through giving the monitoring bodies more teeth:

Whatever the outcome of these inquiries, to the extent that noncompliance with many human rights treaties is commonplace, the current treaty system may create opportunities for countries to use treaty ratification to displace pressure for real change in practices. This is a problem that should be addressed. One obvious step toward improvement would be to enhance the monitoring of human rights treaty commitments, the current weakness of which may make it possible for the expressive and instrumental roles of the treaties to work at cross-purposes.<sup>62</sup>

While quantitative evaluations of the impact of international human rights treaties is a contested field,<sup>63</sup> Beth Simmons has demonstrated that improvements in children’s rights are partly correlated with ratification of the CRC and its protocols after adjusting for other possible causes. For example, levels of child labour and numbers of child soldiers and, to a lesser extent, unimmunized children fell after ratification, particularly in middle-income countries.<sup>64</sup> She also points to qualitative evidence of the catalytic role of the Convention on civil society mobilisation and the development of new legal frameworks.<sup>65</sup> Further, in her quantitative analysis of the effect of the OP to CCPR, Simmons finds that “there is

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<sup>61</sup> Ibid. at 2005-6.

<sup>62</sup> Ibid. at 2022.

<sup>63</sup> Eric Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights?', *Journal of Conflict Resolution*, 49/6 (2005), 925-53.

<sup>64</sup> Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009a) at 307.

<sup>65</sup> Ibid.

some evidence to suggest that the individual complaints mechanism of the ICCPR is associated with modest improvements in civil liberties, controlling for many other possible explanations.”<sup>66</sup> However, she rightly urges caution: “While we need to be cautious in interpreting the evidence, and especially inferring an ironclad causal relationship, the possibility that an individual right of standing before a body of experts helps improve rights outcomes on average provides a strong rationale for ratification.” Both the proponents and opponents of the OP to CEDAW have fallen prey to exaggerating the consequences of the treaty: “It will neither make a serious dent in the statistics cited in the opening paragraph, nor will it constitute a ‘threat to the integrity of the treaty system’.” The same caution can be applied to the deliberations of the OP to the CRC so as not to inflate expectations in any direction.

#### 4.3.2 OP to CEDAW

For a comparison with a process of elaborating an OP concerning a specific class of people, it is useful to turn to the OP to CEDAW. Similar to the CRC, until the OP came into force, the only method to monitor compliance with the treaty was the reporting mechanism. The introduction of the OP was well-received by most legal scholars and women’s groups<sup>67</sup> and advocates for an OP to CEDAW argued along similar lines to those advocating for an OP to the CRC. Primarily, it was argued that the adoption of a complaints mechanism would help to implement the Convention and the guarantees contained therein: that “an optional protocol would strengthen implementation of the Convention by making the rights contained in it, where ratified, justiciable, and reflect their status as autonomous and fundamental to the advancement of women.”<sup>68</sup> Related to this was the argument that “the

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<sup>66</sup> Beth A. Simmons, 'Should States Ratify? Process and Consequences of the Optional Protocol to the Icescr', *Nordic Journal of Human Rights*, 27/1 (2009b), 64-81 at 64.

<sup>67</sup> Andrew Byrnes and Jane Connors, 'Enforcing the Rights of Women: A Complaints Procedure for the Women’s Convention', *Brooklyn Journal of International Law*, 21 (1996), 679-797.; Kwong-Leung Tang, 'Internationalizing Women's Struggle against Discrimination: The Un Women's Convention and the Optional Protocol', *Br J Soc Work*, 34/8 (December 1, 2004 2004), 1173-88.

<sup>68</sup> 'Elaboration of a Draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women' (10 January 1996) UN Doc. E/CN.6/1996/10.

opportunities given to CEDAW to consider individual cases would permit it to develop a more focused and detailed jurisprudence of the Convention, which in turn [would] assist states parties and others in more effectively implementing the Convention at the national level.”<sup>69</sup> Another argument advanced for the OP-CEDAW was that it would facilitate the effective adjudication of economic, social and cultural rights, which were still subject to the traditional hierarchical downplaying as compared to civil and political rights. Given that the Covenant on Economic, Social and Cultural Rights (CESCR) now has an OP, after a strongly contested and deliberated process, it is not surprising that this issue has not been raised as a major hurdle to be overcome in the context of the deliberations for an complaints procedure to the CRC.<sup>70</sup> Advocates also pointed out, not insignificantly, that “by adopting such an instrument, states would be demonstrating that their rhetorical commitments in relation to the protection of women’s human rights are indeed backed up by action.”<sup>71</sup> The same would apply to children. Until now, the lack of an enforcement mechanism for the CRC has marginalised the importance of children’s rights: [k]nowing that one has rights at the international level can be empowering, but knowing that one has rights that can be *enforced* at the international level can only be more empowering.”<sup>72</sup>

#### 4.3.3 Assessing the effectiveness of the OP to CEDAW

What is the assessment of the effectiveness of the OP to CEDAW? Most of the criticisms seem to stem from the evidence of the continuing violations against women – that the soft

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<sup>69</sup> Andrew Byrnes, 'Slow and Steady Wins the Race: The Development of an Optional Protocol to the Women's Convention', *Am. Soc'y Int'l L. Proc.*, 91 (1997), 383-88 at 385.

<sup>70</sup> See 'Additional Views of Governments, Intergovernmental Organizations and Non-Governmental Organizations on an Optional Protocol to the Convention' (18 February 1997) UN Doc. E/CN.6/1997/5 at [38-61] for a detailed exposition of the justiciability issue for the OP to CEDAW and the views of governments, intergovernmental organisations and non-governmental organisations.

<sup>71</sup> Byrnes, 'Slow and Steady Wins the Race: The Development of an Optional Protocol to the Women's Convention', at 385.

<sup>72</sup> Heidi Gilchrist, 'The Optional Protocol to the Women's Convention: An Argument for Ratification', *Columbia Journal of Transnational Law*, 39 (2001), 763-83 at 778.

enforcement mechanisms of the OP have not prevented violations from occurring. The inadequacies of the optional protocol as a remedy for CEDAW are identified by one critic as being the result of the voluntary nature of states' willingness to be bound by the treaty (that the terms of the OP apply only to states parties to both the CEDAW and the OP); that the ratification of the OP is subject to an "opt-out clause"; the limited power of the committee (that is can only provide non-binding "views"); and that the OP lacks "compelling sanctions and penalties" for violations of the treaty.<sup>73</sup> Ultimately, the critique hinges on the OP being "soft law" – non-binding, consisting of general norms and principles and "not readily enforceable through binding dispute resolution." This however, can be the criticism hailed against all the UN treaties and enforcement mechanisms. I would submit that such arguments against the adoption of an OP fall prey to the same exaggerated understandings or expectations of an OP that inform those of the "over-judicialization" camp of critics, as noted by Simmons. Effectively, the expectation that the Committee functions as a judicial body – fears that it will, or criticism that it falls short – is the same premise that informs both extremes. The Committee is not meant to be a court, and the opposition to an OP due to any fears or expectations that it should be so, would be mistaken.<sup>74</sup>

The protocol does not substitute the decision of an international court for local legislative decision making. External enforcement (since there is none) will not undermine these rights' stature and acceptability. "Litigation" will not crowd out other approaches, since the process of communication outlined in the protocol is not designed to supplant local approaches to local economic and social issues, but rather to complement them. The idea that the optional protocol represents overlegalization run amok is a contorted caricature of the protocol. Once we correctly understand that we are not in the world of litigation, but instead in the world of communication and persuasion, many of the arguments against ratification of the Optional Protocol lose

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<sup>73</sup> Kerri L. Ritz, 'Soft Enforcement: Inadequacies of Optional Protocol as a Remedy for the Convention on the Elimination of All Forms of Discrimination against Women', *Suffolk Transnational Law Review*, 25 (2001-2002) at 208-16.

<sup>74</sup> Simmons, 'Should States Ratify?', at 71.



their bite. The whole debate [...] is far less ominous when the purpose is dialogue and persuasion rather than “strict violationism”.<sup>75</sup>

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<sup>75</sup> Ibid.

## **5 Call for an Optional Protocol to the CRC facilitating individual communications/complaints**

### **5.1.1 Changing views of children's rights**

Despite the tendency to naturalise childhood, to treat it as an unchanging essence, childhood is socially and historically constructed: how childhood is understood, lived and treated has demonstrably changed over different historical periods. Nowhere is this clearer, than in the development of international law concerning children. Having entered the world stage in the 1924 Declaration of the Rights of the Child is the first expression of the rights owed to children. Whilst bringing the child out of the shadows of “historical diplomatic invisibility”<sup>76</sup> its language is couched in language more appropriate to child welfare, than to rights. In parallel with the developments in international human rights law more generally, the post-Second World War formulations of the 1959 Declaration of the Rights of the Child<sup>77</sup> represents a paradigmatic shift in thinking about children's rights, as “Although the Declaration may be dismissed as representing only ‘manifesto rights’, the 1959 Declaration in comparison to its 1924 predecessor, adopts the language of entitlement.”<sup>78</sup> As the ‘conceptual parent’ of the CRC, the 1959 Declaration paved the way for the initial Polish draft in 1978.

Overall, the CRC successfully achieved the creation of new rights for children under international law, where previously no rights existed, such as the child's right to preserve

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<sup>76</sup> Van Bueren, *The International Law on the Rights of the Child* at 6.

<sup>77</sup> In contrast to the Universal Declaration of Human Rights, this was adopted by the General Assembly of the UN on 20 November 1959 without abstention.

<sup>78</sup> Van Bueren, *The International Law on the Rights of the Child* at 12.

his or her identity and the codification of accepted practice and the creation of binding standards, in areas which were previously non-binding recommendations.<sup>79</sup> In keeping with the framework of international human rights law more generally, children now were recognized as rights-holders in their own right, as against the states in which they live. In his 1992 study, Veerman also documented this change of perception<sup>80</sup> from the “child as the *object* rights in need of protection to the *subject* of rights whose opinion is voiced and asked for.”<sup>81</sup> Other positive changes are argued as having taken place, reflecting this tectonic paradigm shift in perceptions of children: the shift from a *charitable* to a *political* conceptual understanding, as well as the nature of the advocacy, being two examples. In relation to the latter, “[w]hereas in the beginning of this century children’s rights were advocated by individuals [...]”<sup>82</sup> their cause became more and more the concern of social and political institutions and was at the same time brought to an international (or supranational) level.”<sup>83</sup> For the purposes of the current inquiry into the OP to the CRC, Veerman’s conclusions related to the negative consequences of this shift are insightful:

There are also some negative aspects to this shift. First, such a wide range is beyond a child’s perception. As long as children were only objects of rights this was no problem. However, now that children are allowed to voice their wishes and complaints, the global range has an alienating effect. (A child will not easily be able to phone to call the Chairman of the Committee on the Rights of the Child of the United Nations.) Therefore the need was felt for narrowing the scope to an individual level.<sup>84</sup>

I would submit that this is where Veerman’s analysis has real bite. By extending the reach of this paradigm shift to the international level, children have been pushed to the outer

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<sup>79</sup> Ibid.

<sup>80</sup> In his sweeping study, Veerman investigated various primary sources (such as early writings of the pioneers of children’s rights), declarations and conventions in the field of children’s rights, secondary sources and oral history material.

<sup>81</sup> Philip E. Veerman, *The Rights of the Child and the Changing Image of Childhood* (Dordrecht: Martinus Nijhoff Publishers, 1992) at 396.

<sup>82</sup> Demonstrated in Chapters V, VI, and VII.

<sup>83</sup> Veerman, *The Rights of the Child and the Changing Image of Childhood* at 396.

<sup>84</sup> Ibid. at 396-7.

margins and therefore an attempt to bring them back into the folds – from the peripheries of the international system to a more inclusive engagement – becomes necessary. A retrenchment of this effect of the international system (of protection) is needed in order to reduce the marginalisation of children in the bigger picture. Two decades on from this analysis, a complaints procedure precisely would seem to be in order.

### 5.1.2 An Optional Protocol on the Horizon

Perhaps unsurprisingly then, there is now a strong and growing international campaign for the drafting and adoption of an OP to the CRC to provide a communications/complaints procedure. The machinery was set into motion by NGOs, human rights institutions and other international bodies. This NGO working group appears to have been the main campaigner for an OP to the CRC allowing for individual complaints, with over 635 international and national organizations having signed the associated petition: “An international call to strengthen the enforcement of the UN Convention on the Rights of the Child by the drafting of an Optional Protocol to provide a communications procedure”. The culmination of the above campaigning resulted in the adoption on 17 June 2009 by the UN Human Rights Council of a Resolution establishing an Open-ended Working Group with a mandate to “explore the possibility of elaborating an optional protocol to the Convention on the Rights of the Child to provide a communications procedure complementary to the reporting procedure under the Convention”. The ‘Open-ended’ nature of the Working Group ensures that all UN Member and Observer States, intergovernmental organizations with ECOSOC consultative status may attend and participate in the public meetings of the Working Group.

The Working Group met for the first in December 2009 and States, experts and civil society had the opportunity to discuss the different issues raised by the creation of this new instrument. On the 18<sup>th</sup> of March 2010, only a few months later, the Human Rights Council has adopted by consensus a new resolution (Appendix 1) that gives the Working Group the mandate to draft an Optional Protocol.<sup>85</sup>

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<sup>85</sup> UN Doc. A/HRC/13/L.5 18 March 2010.

## 5.2 First Session of the Open-ended Working Group for the Communications Procedure

### 5.2.1 Introduction

The Working Group held its first session in Geneva from the 14-18 December 2009, whereby it was hoped, that by the end of the session, the Working Group would agree that there is a need to begin drafting this new procedure. A stronger mandate would thus be sought through a Resolution in the Human Rights Council at its March session in 2010. It would seem that this specific aim was not met, with the Chairperson of the Working Group, Mr. Štefánek (who had initially planned to propose a recommendation to this effect in his report) having ‘changed his mind and decided to leave this decision to the Human Rights Council at its March session.’<sup>86</sup> However, there was a positive reception, indeed ‘strong and unanimous support’ for the need for moving on to the elaboration of the necessary OP, as evidenced by the fact that ‘many States indicated their commitment to this goal,’ with no state having voiced opposition to the proposal.<sup>87</sup> This is supported by the statement of the representative of the International Commission of Jurists, who stated that ‘it seems clear that most participants concur that the establishment of a communications procedure is both necessary and practicable.’<sup>88</sup>

Overall, five pertinent issues regarding the need for, scope and procedural characteristics of such a OP were considered over the 16-17 December period of the session, namely: (i) Reasons and timing, (ii) Existing mechanisms, (iii) Efficiency in protection, (iv) Unique rights, and (v) Implications of a procedure. The Chair of the CRC Committee provided the framework for discussion, in her opening address for the first discussion topic: that the

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<sup>86</sup> ‘Meeting of the Un Working Group for the Communications Procedure, December 2009’, (CRIN, 2010) at 18.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid. at 18-9.

CRC Committee had extensively discussed such an OP, and considered it feasible and very necessary.

### 5.2.2 Reasons and timing

The CRC General Comment 12, on the right to be heard, was seen to pave the way for the OP in this topic of discussion. Again, the general mood of states was positive, with many states reiterating a number of common grounds of support: that children had waited long enough for their rights to be realized; that children's rights are unique rights that therefore require a unique procedure; that children's rights must be protected at the national, regional and international levels; and that such an OP will facilitate a stronger normative international framework.<sup>89</sup> Even states that did not enunciate the need for an OP were generally open and willing to be convinced, with (fewer) more guarded responses, such as that of South Korea, whose representative queried whether having a domestic system would be a good alternative to a complaints mechanism system.<sup>90</sup> That the CRC is now the only monitored treaty without a complaints mechanism, therefore subject to discrimination, may be seen as mere symbolism. However, the argument that the singling out of the CRC is discriminatory goes beyond being a mere tokenistic gesture to being a very strong argument that 'can really only be challenged by challenging the very concept of children as rights-holders.'<sup>91</sup> Strong arguments would have to be advanced as to why children are not rights-holders – a discussion which has not been entered into at the Working Group meeting or in the literature to date.

### 5.2.3 Existing mechanisms

Judging by the report of the proceedings the dialogue of what can be learned from other international mechanisms, pivoted around the concern for the duplication of existing

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<sup>89</sup> See for example, the statements of representatives from the Maldives, Slovenia, Portugal, and Switzerland.

<sup>90</sup> 'Meeting of the Un Working Group for the Communications Procedure, December 2009', at 6.

<sup>91</sup> Paulo Sergio Pinheiro, 'Reasons and Timing to Elaborate a Communications Procedure under the Convention on the Rights of the Child' (10 December 2009) UN Doc. A/HRC/WG.7/1/CRP.4, at 4.

mechanisms. The UN Special Rapporteur for sexual exploitation, child prostitution and child pornography, who introduced this topic, led the discussion through a positive emphasis on the complementarity between the roles of the various treaty bodies, particularly with reference to children. On the whole, the conclusions seemed to rest on the inevitability of duplication, but that this was a positive factor, rather than one to be viewed negatively. Forum shopping would be discouraged, it was suggested, where there was consistency and overlap between the treaty bodies. Interestingly, the issue as to the actual number of complaints having been received, to date, by or on behalf of children, was raised by China, but not developed. The representative asked: “How many complaints have they received to date? We believe the number has been low, so we need to know why this has been the case.”<sup>92</sup> It would seem that the answers to these questions would go a long way towards understanding the specific case of children as complainants, and the extent to which the current system is able to effectively offer remedies to children alleging violations of their human rights. I attempt to answer these questions, in the later section of my analysis, in order to shed some light on the issue as to the *need* for a complaints mechanism to the CRC.

#### 5.2.4 Efficiency in protection

The gap between standard-setting instruments and practice is one which is often bemoaned. Needless to say, the disparity between ratification of the CRC (which is near universal save for the United States of America and Somalia) and implementation reflects and reinforces this all too-commonly expressed observation. This is an underlying theme structuring this topic of discussion of the Working Group. Mr. Newell, one of the experts who presented at the Working Group meeting stressed the interconnectedness of international, regional and national mechanisms – that they are not mutually exclusive – that strengthening the CRC would translate into improved national/domestic implementation; this would be the only way to prevent the adverse progress and persisting violations from going hand in hand. A major concern expressed here, by Canada for example, was the collective complaints

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<sup>92</sup> 'Meeting of the Un Working Group for the Communications Procedure, December 2009', at 7.

procedure. Having raised the issue, it was then addressed in turn by Mr. Newell who reminded state representatives that both individuals and groups of victims were provided for as complainants in the OPs to the CESC and CEDAW. Further, Newell attempted to reassure states that the collective complaints procedure would be one way of developing a procedure which could constructively influence national laws and policies: “surely we have to accept and welcome a dual aim of communications – to achieve individual remedies where violations have occurred as speedily as possible, but also prevent further, similar violations from occurring.”<sup>93</sup> However, states’ concluding level of agreement or otherwise, on the issue of collective complaints is not clear from the report of the text.

#### 5.2.5 Unique nature of rights

Many of the rights safeguarded by the CRC are not covered by other provisions in the various core international human rights treaties. The following (non-exhaustive list) provides some examples of the CRC’s improvements over other treaties:

1. Best interests of the child (Article 3);
2. Preservation of identity (Article 8);
3. Right to express opinions (Article 12) which is “a unique provision in a human rights treaty, which addresses the legal and social status of children, who, on the one hand lack the full autonomy of adults but, on the other, are subjects of rights”;
4. Prevention of abuse by those responsible for care (Article 19) which is significant as it implicitly extends responsibility to private individuals, thereby destabilising the ‘traditional’ public private divide, emphasises prevention of intra-familial abuse and neglect ‘which has never previously figured in a binding instrument;’
5. Adoption (Article 21) which codifies principles that were adopted three years earlier by the UN in the framework of a non-binding declaration.
6. Health and access to care (Article 24) where for the first time State’s are under an obligation to work towards abolishing harmful traditional practices and references are made to the advantages of breastfeeding;

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<sup>93</sup> Ibid. at 10.



7. Rights of child cared for outside the family to periodic review of care (Article 25);
8. Obligation to recover maintenance from those having financial responsibility for the child (Article 27);
9. Education and school discipline to be consistent with child's human dignity (Article 28);
10. Education to meet detailed aims (Article 29);
11. Right to rest, leisure and play (Article 31); and
12. Specific protection from sexual exploitation and abuse, including child pornography (Article 34).

As suggested by the Vice Chair of the CRC, one can go as far as to state that ‘nearly all the rights under the CRC are specific rights. It is much easier to mention the rights that are not specific to children; they are the thematic rights such as non discrimination [*sic*] and so on, which apply to all treaties.’<sup>94</sup> Even where the rights that the CRC spells out are not exclusive rights, the CRC spells them out *uniquely*. It could be argued that even where the rights are covered elsewhere, the child-focused nature of the rights constituted therein makes the CRC uniquely suited to promote and protect the rights of children specifically. By way of an example, the right to education is enshrined in a range of international conventions, including the ICESCR, CEDAW as well as the CRC, and various regional treaties. In articulating the right, the CRC provides more detail by requiring that “States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity” (Article 28) and sets out some of the broader aims of education for children in Article 29. In its General Comment 1 on the Aims of Education,<sup>95</sup> the CRC Committee stressed the importance of these aims as being “linked directly to the realization of the child's human dignity and rights, taking into account the child's special developmental needs and diverse evolving capacities.”

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<sup>94</sup> Ibid. at 11.

<sup>95</sup> CRC, ‘General Comment 1: The Aims of Education – Article 29 (1)’ (2001) UN Doc. CRC/GC/2001/1.

The CRC is broad in scope, covering both economic, social and cultural rights and civil and political rights, without the now redundant distinction between them. The theme discussed by the Working Group under this head of discussion was whether children and their representatives need a procedure that enables them to pursue remedies for breaches of their full range of rights, when national remedies are non-existent or ineffective. The report of the proceedings is the most detailed here, with state representatives having raised a number of related concerns. Argentina opened by raising the issue of capacity, and that it is to the Disabilities Convention (CRPD) to which we must turn for guidance as to how this can and has been accommodated. South Korea again demonstrated a mutually exclusive approach by expressing the desire to see better national implementation – through institutions such as ombudsmen – and that contentment with the status quo through stating that the CRC Committee’s General Comments could be more influential in this regard. The issue of manipulation of children was also raised here – how to ensure the child was not manipulated through a complaints procedure. Surely this is not new to this OP as children have not been barred from submitting complaints before the other treaty bodies, on these grounds. As a child-specific instrument – drafted (and implemented) specifically with children in mind – the CRC would seem ideally placed to deal with these issues.

#### 5.2.6 Right to a Remedy

The issue of remedies, though not raised as an independent topic for discussion, arose in the context of unique rights, detailed above. Ms. Pais, the UN Special Representative on Violence Against Children raised this primary issue, that: “The Convention says we must have a remedy and it doesn’t do it explicitly so we need an OP.”<sup>96</sup> This is a critical question, and one that was raised independently by a CRC Committee member back in 2002 in addressing the various ways of strengthening complaint procedures:

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<sup>96</sup> ‘Complaints Mechanism: Unique Rights’,

<<http://www.crin.org/resources/infoDetail.asp?ID=21458&flag=news>>, accessed 14 May 2010. See also “Human Rights Council Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure: Marta Santos Pais, Special Representative of the Secretary-General on Violence against Children” (14 December 2009) UN Doc. A/HRC/WG.7/1/CRP.

I [would] like to note that the CRC does not contain any specific provision regarding the possible actions by or on behalf of the child in case of a violation of her/his rights. But other treaties do: Article 2(3) ICCPR stating that States Parties undertake to “ensure that any person whose rights or freedoms (recognized in the ICCPR) are violated shall have an effective remedy.”<sup>97</sup>

Many delegates pointed to the inherent right of children to a remedy for violations of rights. Slovakia, who holds the chairmanship of the Working Group, stated “that there was no doubt that children were full rights holders and should have every chance to have their rights respected.”<sup>98</sup> The Chair then continued that “having the CRC Committee investigate complaints is the only way to go to ensure all their rights are fulfilled” although acknowledging that it was only one extra tool to increase ‘effective implementation’.

This argument for the primacy of remedies has been central to human rights thought and the right to a remedy is contained in the Universal Declaration of Human Rights itself in Article 29. As Dinah Shelton has noted, the terms ‘remedies’ and ‘redress’ refer to both “the substance of relief as well as the procedures through which relief may be obtained.”<sup>99</sup> Both of these elements are relevant to an OP to the CRC which is said to provide the *procedural* mechanism for child victims of human rights violations and *substantive* redress or damages for violations of specifically child-related rights. This distinction is made clear in the HRC Resolution 10/14 where reference is made to ‘child-sensitive procedures’ as a means of facilitating effective remedies.

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<sup>97</sup> Jaap E. Doek, 'Ways to Strengthen the Complaints Procedures, Particularly the Individual Complaint', *Stopping the Economic Exploitation of Children: New Approaches to Fighting Poverty as a Means of Implementing Human Rights?* (Hattingen, Germany, 2002) at 6.

<sup>98</sup> 'Complaints Mechanism: Discussions Begin at the Un',  
<<http://www.crin.org/resources/infodetail.asp?id=21436>>, accessed 14 May 2010.

<sup>99</sup> Dinah Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 2005) at 8-9.

The right to redress or remedies is not explicitly mentioned in the CRC but the Committee in its General Comment No. 5 has viewed them as essential to the effective implementation of the CRC:

For rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties. Children's special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights. So States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include the provision of child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance. Where rights are found to have been breached, there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39.<sup>100</sup>

This perspective was recently endorsed by states at the Human Rights Council in March 2009, where all states were called upon:

to ensure that child-sensitive procedures are made available to children and their representatives so that children have access to means of facilitating effective remedies for any breaches of any of their rights arising from the Convention through independent advice, advocacy and complaint procedures, including justice mechanisms, and that their views are heard when they are involved or their interests concerned in justice procedures [...].<sup>101</sup>

Given this strong state affirmation of the right of children to a remedy, it is perhaps not surprising that no delegates in the Working Group disagreed with this basic position that remedies were necessary for the fulfilment of rights. Likewise, none of the more general arguments against judicial or administrative review at the national or international level were noted:<sup>102</sup> that it was an intrusion on democratic or sovereign space; that legalisation of

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<sup>100</sup> UN CRC General Comment No. 5: General Measure of Implementation of the Convention on the rights of the Child (2003) at 7.

<sup>101</sup> HRC Resolution 10/14, 'Implementation of the Convention on the Rights of the Child and the Optional Protocols Thereto' (26 March 2009), at [11].

<sup>102</sup> See analysis of the discussions on this topic in the OP-ICESCR Working Group in the context of the broader literature in Malcolm Langford, 'Closing the Gap? An Introduction to the Optional Protocol to the

rights distracted from effective collective solutions or that other forms of international dispute resolution could obviate the need for such a procedure.<sup>103</sup>

Moreover, there were no states who ventured the argument that they themselves were perfectly capable of fashioning domestic remedies for the problem and that the focus should be on strengthening national systems. The representative of South Korea, who supports the process, did ask the question “whether having a domestic system would not be a good alternative to a CRC complaints mechanism.”<sup>104</sup> The answers provided by other states emphasized “that there are often no effective national systems for safeguarding children's rights” and that “one of the main ways to improve national remedies is to bring in the OP”.<sup>105</sup> According to this line of reasoning, the requirement of domestic remedies under the OP will force states to improve national complaint systems to avoid international complaints or that the protocol may inspire national actors to further improve domestic remedies. This argument was also successfully put forward in arguing for ratification of OP to CEDAW where the complaints procedure “stimulates the development and improvement of internal remedy systems which cannot be neglected by international supervisory bodies and – what is more important – will have a corrective and preventive effect against other human rights violations.”<sup>106</sup>

Lastly, there was little discussion over whether all or only some of the rights in the CRC were deserving of a remedy. In particular, no states objected to economic, social and

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International Covenant on Economic, Social and Cultural Rights', *Nordic Journal of Human Rights*, 27/1 (2009), 1-28 at 1.

<sup>103</sup> See Section 4.2 above. However, the sentiment was clear at the Working Group that additional tools were potentially needed beyond that of the Special Rapporteur mandates.

<sup>104</sup> 'Complaints Mechanism: Timing and Feasibility Discussion',  
<<http://www.crin.org/resources/infoDetail.asp?ID=21444&flag=news>>, accessed 14 May 2010.

<sup>105</sup> Ibid.

<sup>106</sup> Gilchrist, 'The Optional Protocol to the Women's Convention: An Argument for Ratification', at 780.

cultural (ESC) rights being subjected to the proposed international complaints procedure. One of the likely reasons for this is that the issue was substantially addressed during the drafting of the OP-ICESCR. The Chairperson of the Committee of the Rights of the Child indicated that in discussions in 1999, the justiciability of ESC rights was identified as a potential barrier to the development of a protocol.<sup>107</sup> Ten years later, delegates at the Working Group expressly stated that it no longer posed such a problem. The adoption by consensus of the OP-ICESCR in the General Assembly in December 2008 had resolved the question.

#### 5.2.7 Implications of a procedure

The concerns raised here, by state representatives, revolved around the fear of overload of work for the CRC Committee, and the potential to jeopardize the reporting procedures of the CRC. The Chair of the CRC Committee tried to allay these fears thorough her reassurances that the CRC Committee's role would in no way be compromised by the addition of a communications procedure.<sup>108</sup> It is in this context that Italy raised another critical procedural issue (I turn to this issue in Chapter 7) as to timing of and time-limits for complaints: namely, what happens in the event that the violation complained of occurred in childhood, but is presented as a complaint when the complainant is older 18 years of age? The report does not detail a response by any Committee members to this question.

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<sup>107</sup> 'Complaints Mechanism: Timing and Feasibility Discussion', Ms Lee is also quoted as indicating that the international community was more interested in the definition of child rights at this time rather than procedural matters: see UN HRC, 'Report of the Open-Ended Working Group to Explore the Possibility of Elaborating an Optional Protocol to the Convention on the Rights of the Child to Provide a Communications Procedure', (21 January 2010) UN Doc. A/HRC/13/43, at [26].

<sup>108</sup> Yanghee Lee, "Reasons and timing for a communications procedure under the Convention on the Rights of the Child" (14 December 2009) UN Doc. A/HRC/WG.7/1/CRP.6.

## 6 Current instruments and low usage

As individuals, children can seek redress for any alleged breaches, through individual complaint mechanisms under the aforementioned<sup>109</sup> conventions. I searched all of the cases brought to the HRC, CEDAW Committee and CERD Committee, where children were applicants directly, or where cases were brought on behalf of children.<sup>110</sup> Upon examination, I found there to be too few cases, which fulfilled these criteria: approximately 40 cases before the HRC and one under CEDAW and CERD respectively (see Figure 1, below). The cases brought before the HRC are clustered under particularly identifiable themes, namely: disappearances, custody cases, deportation (under the heads of interference with family and failure to protect minors), religious education, death row, and imprisonment. In my survey I included cases where children were not parties but affected by the decision. This can be exemplified by a case brought by parents regarding their right to educate their children according to their religious beliefs, where the children were not parties (except indirectly) and it was the right of the parent that was being argued, not that of the child's right to education.<sup>111</sup> Similar cases where children were indirectly affected were the minority rights cases, where the decision of the HRC has an effect on children as members of indigenous groups specifically.

The one case brought before the CERD Committee involving a child was one of racial discrimination brought by a father on behalf of his son (who was aged 15 at time of events). The case was ruled inadmissible by Committee on two grounds: firstly, on the ground that there were no heads of dispute or provisions identified by the author for complaint, and secondly, that the complaint regarding the author's son was seen to fall outside the scope of the Convention (namely that the author requested a criminal retrial).<sup>112</sup>

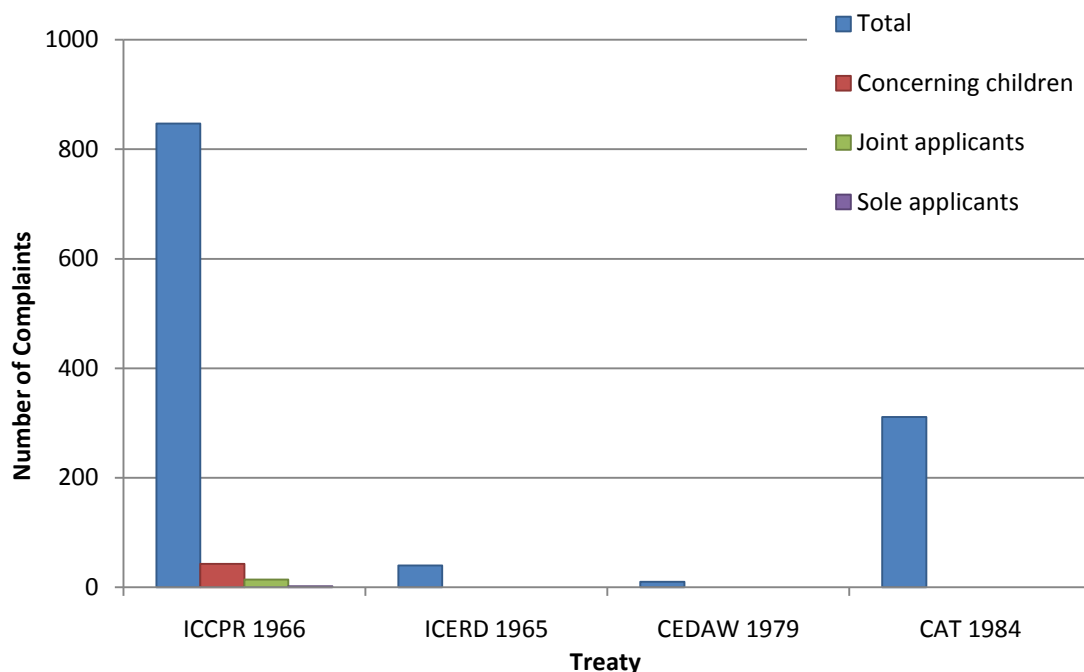
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<sup>109</sup> See note 4 above.

<sup>110</sup> Including children up to and including the age of 18.

<sup>111</sup> See *Waldman v. Canada* (1999) and *Tadman et al v. Canada* (1999).

<sup>112</sup> *P. and his son M.P. v. Denmark* (1995) CERD Communication No. 5/1994.



**Figure 1: Children's participation in decided cases since the adoption of an optional protocol to various treaties.**

The case brought before the CEDAW Committee is a procedurally interesting case where a six-year-old girl was one of the authors of the complaint, the others being two of her older adult siblings.<sup>113</sup> Two NGOs submitted the complaint on behalf of the authors. Here, though a minor was the complainant, the case was brought on behalf of the deceased victim, the mother of the applicant,<sup>114</sup> and not on the child's on behalf. As this is the only

<sup>113</sup> The victim had had three children from her first marriage, two of whom are adults. Her youngest daughter, Melissa, was born on 30 July 1998. Signed consent forms from two adult children and one minor represented by her father were received.

<sup>114</sup> *Fatma Yildirim (Deceased) v. Austria* (2007) CEDAW Communication No. 6/2005.



case brought by a child applicant to the CEDAW Committee, it could support one author's claim that CEDAW is not effective at protecting the rights of girl children.<sup>115</sup>

Upon an examination of the cases brought before the Human Rights Committee (monitoring body for the CCPR), two observations are discernable, among others. The first is related to the child's applicant status. Often the application is made by an adult, often an interested party herself, on the child's behalf, rather than the child submitting his or her own Communication. "[I]t seems likely that, to date, most if not all of the cases in which children are named as applicants have in fact been initiated and pursued by adults and the named children have had very little, or no, involvement in the procedure."<sup>116</sup> This seems particularly true for complaints made to the Human Rights Committee.

Secondly, it becomes apparent upon perusal of the cases, that there is no gender-specific approach by the Human Rights Committee to the cases brought before it. Some cases do involve girls, but that is not an issue that is isolated as being particularly decisive. No doubt, this is a reflection of the wording of the International Bill of Rights itself, where no reference is made to the girl child in the International Covenant on Economic, Social and Cultural Rights (hereinafter CESCR) and the CCPR. This can be seen to reflect a gender-neutral approach to children's rights in international human rights law generally and in the CRC specifically. As highlighted by one commentator, the gender-neutrality of the CRC operates to further marginalise and silence the voices of specific children, here girls, in international human rights discourse: "Despite almost universal ratification, the efficacy of the Convention is diminished by its failure to account for the intersecting identity of girls. It's luke-warm provisions for the rights of girl-children and the omission of girl-specific

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<sup>115</sup> See Taefi, 'The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child', (at 52. Incidentally the word "girl" does not feature at all in the terminology of the CEDAW Convention.

<sup>116</sup> Peter Newell, 'Children's Use of International and Regional Human Rights Complaint/Communications Mechanisms: Background Paper', *International Justice for Children* (Strasbourg: Council of Europe, 2007), 17.

issues have instituted a lacuna in the body of international human rights law.”<sup>117</sup> This is reminiscent of the arguments in favour of an OP to CEDAW, that the androgynous nature of the International Bill of Rights – Universal Declaration on Human Rights (UDHR) and its two Covenants – rendered women invisible international human rights protection framework. The CRC is seen to reflect the same gender-neutrality. Thus, although hailed as feminist landmark,<sup>118</sup> the CRC “appears to have fallen short of its potential. The linguistic factors that once seemed crucial are now exposed tokenistic”<sup>119</sup> which suggests that assertion that apparent ambiguities in the CRC further serve to make girls vulnerable to ongoing discrimination in the existing frameworks of the international system of protection. Consequently, the question as to the need for an OP is rendered even more relevant given the capacity of a semi-judicial supervisory body to demarcate the boundaries of a given legal instrument through the opportunity afforded by individual complaints mechanisms. An individual complaints mechanism has the added benefit that “[c]onsideration of individual cases provides the supervisory body with an opportunity to interpret human rights guarantees in a manner which general discussions and exegeses do not provide.”<sup>120</sup> One would envisage that in the event of such an OP, the CRC Committee would offer more gender-specific analyses of cases brought before it by girls who are the victims of gender-specific abuses of their human rights.

Returning to the Human Rights Committee and its assessment of child-related cases – brought on behalf of or by children: how does one account for the low usage of the system by children? Does it reflect merely a procedural problem of access to justice, or is it

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<sup>117</sup> Taefi, 'The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child', at 356.

<sup>118</sup> Cynthia Price Cohen, 'The United Nations Convention on the Rights of the Child: A Feminist Landmark', in Michael Freeman (ed.), *Children's Rights* (Dartmouth: Ashgate, 2004).

<sup>119</sup> Taefi, 'The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child', at 357.

<sup>120</sup> Byrnes and Connors, 'Enforcing the Rights of Women: A Complaints Procedure for the Women's Convention', at 703.

indicative of the lack of protection afforded by the substantive provisions contained in CCPR? By way of an overarching answer to these questions, perhaps this is a reflection of the adult-oriented nature and focus of the instruments in question; that, as it is “For some external critics, the discourse of human rights is not just [adult]-dominated and –deployed: it is [adult].”<sup>121</sup> Here the language of human rights discourse is seen to render children invisible through its general age-neutrality. In response to the last question, it is not difficult to argue that the absence of specific provisions in the CCPR that deal with child-related concerns may account for its poor use by children. Four of the fifty-three articles of the CCPR explicitly refer to children; article 24 is specifically designed for children and states that every child “shall have, without any discrimination [...] the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State,” “shall be registered immediately after birth and shall have a name,” and “has the right to acquire a nationality.” Article 23 details what is to happen *to* children in divorce and separation proceedings,<sup>122</sup> and perhaps accounts for why a significant proportion of the cases I examined were custody-related. Article 18 establishes the *parents’* right to “the religious and moral education of their children in conformity with their own convictions.” Article 14 is a general provision “aimed at ensuring the proper administration of justice, and to this end upholds a series of individual rights such as equality before the courts and tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.”<sup>123</sup> Children are carved out in this provision only pertaining to the making public of court judgments.

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<sup>121</sup> Engle, 'International Human Rights and Feminism: When Discourses Meet', at 591.; I have replaced the word 'male' with 'adult' for emphasis.

<sup>122</sup> Art. 23(4) reads “States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any *children*.”

<sup>123</sup> HRC, 'General Comment 13: Article 14' (1984) UN Doc. HRI/GEN/1/Rev.1 at 14. Article 14 reads: “ All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent

Another reason that could be advanced as to why other mechanisms are not used by Children is that the problem is primarily that of 'access to justice', where it can be argued that the substantive redress (damages) may be available from the Human Rights Committee, for example, but that there is a barrier to the access to justice for children. Accordingly to this line of reasoning, the substantive provisions are available for use by children. However, as can be seen from the provisions referring to children in the CCPR, if only four out of fifty address children specifically, this may provide one strong reason for its minimal usage. In short, it may evince that children's experiences of their rights violations are not being reflected. Of course, it may also be that the damages are unsatisfactory and therefore inhibit the use of the complaints mechanism to the CCPR; and that if the potential outcome does not seem helpful, the victim will not bring the case. But, this does not seem to be at issue here.

Notwithstanding the few provisions in the CCPR specifically addressing children, perhaps the Human Rights Committee is well-placed to adjudicate children's complaints through its standards upon which it evaluates a claimed human rights abuse. The question as to whether the Committee has effectively used a subjective approach (at least partially) is a useful standard by which to test assess this claim. A subjective approach can be exemplified by the *Vuolanne v. Finland* on the issue of torture, by what the HRC entitles the contextual appraisal (paragraph 9.1) which although an objective analysis, considers the "circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim." Similarly, in *C. v. Australia*, the HRC seemed to determine a violation based on the subjective experience of the complainant, who although treated similarly to all other immigrant detainees, subjectively experienced mental suffering as a result of his detention. While not child

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strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

cases, this type of research inquiry could shed some light on any differences between an OP to the CRC and other committees, such as the HRC and CEDAW Committee that could also protect children rights (as individuals). It would seem from these types of cases that the HRC is capable of dealing with child cases in determining violations on 'child terms' – the child's subjective experience in the case as opposed to an 'averaged' individual standard covering all ages of individuals. This would be a way through which to off-set the very few articles that address children specifically.

However, given the few cases brought before the HRC by children, this confidence is somewhat qualified. Even when brought by or on behalf of children, the HRC can be seen to have been quite limited in its subjective analysis of children. Turning to a highly publicised case which was decided favourably for the applicants (including five children) *Bakhtiyari v. Australia*, it is insightful to assess the way the HRC dealt with the state party's submissions concerning the use of the CRC. The issue turned on article 24, specifically designed for children. Australia rejected that this provision should be interpreted in a similar way to the CRC, quoting the HRC having “noted that it is not competent to examine allegations of violations of other instruments, and should thus restrict its consideration to Covenant obligations.” The tirade against the interpretation of this child-specific provision with reference to the CRC thus continued, that:

[i]t is clear, in any event, that article 24, paragraph 1, is different in nature to CRC rights and obligations, being, as described by Nowak, a comprehensive duty to guarantee that all children within a State party's jurisdiction are protected, <sup>14</sup> whether through support for the family, through support for corresponding private facilities for children, or other measures. The obligation is not complete, extending only to such protective measures as required by the child's status as a minor.<sup>124</sup>

In its Views, the HRC did not refer to the CRC explicitly; however, in finding that “the principle that in all decisions affecting a child, its best interests shall be a primary consideration, forms an integral part of every child's right to such measures of protection as required by his or her status as a minor, on the part of his or her family, society and the

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<sup>124</sup> *Bakhtiyari v. Australia* (2003) Communication No 1069/2002 at [5.15].

State, as required by article 24, paragraph 1, of the Covenant,”<sup>125</sup> it brought one of the four guiding principles of the CRC into the ballpark of its reasoning. I would submit that this case demonstrates the modest victory that is offered by the analysis of children’s claims before an international human rights treaty body, here the most successful one, the HRC. The case clearly demonstrates that even where there is a win for the children, the Committee makes it clear (through its omission of references to the CRC) that it is deciding independently of this important Convention: even despite the reasoning being clearly influenced by the latter. This would seem to strengthen the need for a child-specific forum to which children can submit complaints. Not only would their cases be given a more honest appraisal according to the standards embodied in the CRC, but the substantive grounds upon which they could rely would exponentially increase. Thus, guided by the principles inherent in the CRC and armed with the necessary tools, the CRC Committee would be perfectly placed to adjudicate the claims of individual children and thereby further develop the parameters of the rights contained therein.

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<sup>125</sup> Ibid at [9.7].

## 7 Drafting Issues: Weaving the Fabric of Accountability

### 7.1 Introduction

As can be seen by earlier deliberations for OPs, to CEDAW or to the CESCRC for example, the same recurring issues arise regarding the need for and usefulness of the instrument in question – what it adds to the existing framework of protection. What can perhaps be lost sight of in any discussion about new international mechanisms or procedures for strengthening, monitoring or protecting human rights, and the related evaluation of existing processes and procedures, is the underlying purpose of the instrument in question. In the drafting of an OP to the CRC, one must recall the purpose of the CRC is to make states accountable for the way in which they ensure children have their rights respected and protected. This can be deduced from the “presumption that States parties, in establishing a monitoring mechanism, intended to establish an effective means for achieving *accountability* in relation to the obligations contained in the Convention” (emphasis added).<sup>126</sup> Ultimately, what must be remembered is that this is yet another step in the ongoing process of making states accountable for their treatment of the children in their territory; that:

it is therefore no longer acceptable to ask simply whether the procedures laid down are capable of achieving that goal and, if they are not self-evidently adequate, proceeding to accept large gaps in the fabric of accountability. Instead, the relevant Committee is called upon to develop the threads (and doctrines) which are necessary to weave a whole cloth of State accountability.<sup>127</sup>

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<sup>126</sup> Philip Alston, 'Establishing Accountability: Some Current Challenges in Relation to Human Rights Monitoring', in Eugeen Verhellen (ed.), *Monitoring Children's Rights* (The Hague: Kluwer Law International, 1996), 21-32 at 30.

<sup>127</sup> Ibid. at 30-1.

A deliberated process will build consensus and increase the chances for widespread ratification. On this point we can only look to the CRC itself. The drafting of the CRC took place over a period of ten years, upon the establishment of an ‘open-ended’ working group established for that purpose by the UN Commission on Human Rights in 1979. As highlighted by one particular commentator, and noted by the Secretary-General at the time, there was a “spirit of great co-operation not only amongst the non-governmental organizations but also among states” during the drafting stages of the CRC, to the extent that “a great number of state representatives became more involved with the subject of the treaty than is the norm.”<sup>128</sup> Most poignantly, the lowest common denominator approach of adopting each provision by consensus can perhaps be one reason that accounts for the CRC’s unprecedented ratification rate by States.

At the same time, it is worthwhile keeping in mind the reflection of Philip Alston as to the suitability of an international diplomatic forum being able to ‘resolve’ all relevant issues in the drafting of international instruments. Advisor during the drafting of the CRC itself, he states in this vein that “the inevitably superficial nature of the diplomatic negotiations that took place at the international level in order to produce a compromise document such as the Convention [CRC] are not all conducive to a detailed or nuanced understanding of many of the key issues that arise.”<sup>129</sup>

## 7.2 Who is the Victim?

The concept of the ‘victim’ is a technical one. Under the jurisprudence of the HRC, it has been clearly established that in order to satisfy the victim test the alleged violations of rights must relate to specific individuals at a specific time. “A victim is not hypothetical,”<sup>130</sup> and the individuals must be actually and personally affected by a law or practice which arguably violates their rights.

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<sup>128</sup> Van Bueren, *The International Law on the Rights of the Child* at 388.

<sup>129</sup> Philip Alston, *Children, Rights, and the Law* (London: Clarendon, 1992) at vi-vii.

<sup>130</sup> Emilia Della Torre, 'Women's Business: The Development of an Optional Protocol to the United Nations Women's Convention', *Australian Journal of Human Rights* (6, 2000), 181.



The new optional protocol needs to be drafted with careful consideration of the special status of children and the temporality of childhood. Who is the subject of the OP is a question that brings to the fore the underlying assumptions of one's understanding of children's rights more generally and the CRC itself. Is the Convention seen to be an expression of the rights of *individuals*, whilst they are under the age of eighteen? Or does it accord particular significance to the abuse of the rights of children? In other words, is it merely a tool providing a forum to voice human rights concerns to those younger than eighteen, or is its focus on the collective form of "the child"? If the latter, then the CRC is afforded more symbolic weight by asserting that the violation of a child's rights is of a different class – and possibly even a graver class of human rights violation. If the CRC is seen only as the former, as a means of redress for individuals (with certain age limitations) then its significance is somewhat undermined. I would posit that this question is not merely relevant in the corridors of theory, but has implications for the definition and scope of the victim for a complaints mechanism. Assuming the existence of the OP to the CRC, if one adopts the former understanding of the CRC, then its use would expire at an individual's rite of passage into the world of post-18 adulthood, where he or she then has recourse to the other available mechanisms. According to this line of reasoning, any violation that may have occurred during childhood must now be addressed by another treaty body and Committee. This would be the rational consequence of O'Neil's theory or aptly described "counsel of despair" for children, where the only remedy for their powerless state is to "grow up."<sup>131</sup> However, I would submit that this view undermines the significance of violations of *children's* rights, and prefers to deal with them merely as violations of human rights as experienced by children. Accordingly, once having matured into adulthood, a child could no longer seek redress through the CRC and its potential complaints mechanism. This would pose a significant shortcoming to the CRC's protection of children's rights.

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<sup>131</sup> Fortin, *Children's Rights and the Developing Law* at 13-14.

It is arguable that adults should be able to access the procedure for violations committed during their childhood. Italy was the only country to raise the question of temporality and asked what happens in the event that the violation complained of occurred in childhood, but is presented as a complaint when the complainant is older 18 years of age? It would seem that this question was left hanging. I would submit that such cases should be heard. Why subject children in this case to a limitation that is not imposed in essence on adult victims of the same violations? Since the victim remains one in the same individual, the violation occurs as a child but the effects do not end with childhood, the procedure should be flexible in this regard. Does this then mean that the CRC Committee would be capable of hearing a child-sexual assault claim posed by an individual aged 50, for instance? It may be argued that a time-limit should be placed on such cases. On the face of it, I would submit this should not be a problem, and such a provision in the OP would demonstrate that the CRC is committed to condemning the violations against children. However, if such a time-limit is deemed necessary, then it would be no problem for the CRC Committee to adopt a “continuing violation” approach (similar to that of the HRC in *Lovelace v. Canada*) whereby if the violation has continuing effects into adulthood, then it should be capable of adjudication by the CRC Committee.

There are a number of practical reasons why this approach should be adopted. Many children may only become aware in their adulthood that a violation has occurred when they were young or only as an adult do they have the capacity to set the litigious wheels in motion. In any case, by the time the slow-moving machinery of domestic and international remedies reaches their conclusion in the Committee, the complainant may very well be an adult. The low reported usage of the existing treaty-body system by children may be partly because they become adults by the time they register a case.<sup>132</sup> Scientific research is also

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<sup>132</sup> See for example, *C. v Australia* (1998) which was submitted on behalf of author's son (aged 14 years of age at time of events) as inadmissible. The Committee held that: “As to admissibility, the State party argues that the author lacks standing to present the communication. The State party points out that the author's son was 18 years old at the time the communication was submitted, and that in the absence of exceptional circumstances, the author's son ought either to have presented the communication himself or expressly authorized his mother to submit the communication as his representative. In the absence of any such

increasingly discovering the ways in which childhood maltreatment affects an individual physically, mentally and emotionally, “with those impacts often extending well into old age, if the victim does not receive the right help ... The child is the victim, yet the processing of the violation can be a life-long struggle for the adult.”<sup>133</sup> Such adult-inclusive jurisdiction would also potentially improve and expand the jurisprudence of the Committee and increase the deterrent effect of its rulings. As to the nature of the victim, the provision in an OP could therefore state something to this effect:

Communications *may be submitted by or on behalf of an individual* or groups of individuals, within the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party during their childhood, up to the age of 18.

### 7.3 Anonymity of the child applicant

Existing complaints procedures do not permit victims to remain anonymous. Thus applications which are pursuing the rights of an individual child under other treaty bodies have to name the child as applicant, and where the child is regarded as having capacity, to indicate that they have given their consent to the application being made. A protocol to the CRC should potentially include an identity-suppression provision – that the identity of the child would not be revealed *except with the child’s express consent*.<sup>134</sup>

### 7.4 Best interests of child and consent

Recalling the debates in the realm of moral philosophy of children’s rights, the ‘interest of the child’ is a paternalistic model whereby adults – representatives, the judiciary – exercise judgments as to what is objectively in the child’s best interests. Eekelaar’s critique on this point is pertinent: that this objective test should be supplemented with an additional

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authorization or exceptional circumstances, the communication accordingly is said to be inadmissible *ratione personae*."

<sup>133</sup> ASCA Media Release, ‘ASCA Seeks Global Change for child abuse victims and adult survivors through submission to Australian human Rights Commission Consultation,’ 15 June 2009.

<sup>134</sup> See the similar provision in Article 14(6)(a) in CERD and CEDAW Article 6(1) respectively.

“dynamic self-determination” principle.<sup>135</sup> Article 3 of the CRC explicitly sets out the ‘best interests’ model of protecting the rights of children; however, there would seem to be no reason why the CRC Committee could not adopt additional elements as part of their interpretation of this principle. The question thus arises, as to what is the nature and content of this article, in the drafting of an OP to give life to this provision, as it were. Would it function merely as a guiding principle – an overriding, general rule, like the principle of non-discrimination – that is to be read into all of the other provisions of the CRC?<sup>136</sup> Or is article 3 also a substantive stand-alone provision, capable of being raised in its own right, without reference to any of the other rights listed in the Convention? This is a question that would need to be addressed in the drafting of the OP.

## 7.5 Representation

In terms of procedural requirements, a major concern with a complaints procedure would be to ensure that the access to justice being granted to the child is genuine, and not abused by representatives of the child. This was a concern expressed by members of the Working Group to the extent that it was suggested that children only should be able to complain to the CRC Committee. This view is perhaps not as simplistic as it is naïve. Children already have access to representation to appear before the other treaty bodies and a restriction of this existing right would have to be strongly justified.

This issue is perhaps best addressed in the drafting. There are safeguards can easily be implemented in the OP to the CRC, with one significant element being the use of the ‘best interests of the child’ – one of the guiding principles of the CRC – where the child is not able to consent due to age or other reason, as a standard to be applied. Thus the substantive wording of a provision might look like the following:

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<sup>135</sup> See Section 3.3.1 above.

<sup>136</sup> Cf article 14 of the European Convention of Human Rights: a stand-alone non-discrimination provision that is not capable of being the basis of a complaint in its own right, but can only be tacked onto other provisions in the said Convention.

Where a communication is submitted on behalf of an individual or group of individuals, this shall be with the individual's consent unless the author can justify acting on their behalf without such consent, in which case the Committee shall consider whether it is in the best interests of the child or children concerned to consider the communication.<sup>137</sup>

The representation of children is also not a novel concept for advocates and the judiciary in a number of domestic jurisdictions. For instance, the issue arises in the Northern American context whereby children are represented by state authorities in cases of care and custody. Echoing both autonomy and interest-based theories of child's rights, one advocate highlights the distinction, for example, between the "expressed interest of the child" namely the child's own interest as represented by her own lawyer, as opposed to the "protected interests of the child" typically argued by the lawyer appointed as a guardian.<sup>138</sup> However, it cannot go unnoted that in opposition to the usual relationship between international human rights norms and domestic practice, the CRC has demonstrated a different relationship between international and national approaches whereby children's rights have "moved significantly ahead of domestic law in this domain."<sup>139</sup> Thus, the drafters need not be entirely constrained by domestic procedures and practice in formulating an effective, child-friendly and focused complaint mechanism for children. The ambiguity surrounding the concept of the best interests of the child is perhaps the strongest reason in favour of having it judicially tested and applied by the quasi-judicial body that is the CRC Committee.

Thus, any persons representing the child (as the victim) would have to demonstrate and satisfy this test in order for the complaint to be admissible before the CRC Committee. Consequently, the heads of complaint would have to address the concerns of the victim-

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<sup>137</sup> Taken from the Text of Draft Optional Protocol to provide a communications procedure, by the NGO Advocacy Group (February 2008).

<sup>138</sup> Lewis Pitts, 'The Right to Be Heard: The Child as a Legal Person', in Kathleen Alaimo and Brian Klug (eds.), *Children as Equals: Exploring the Rights of the Child* (Lanham, Md.: University Press of America, 1992), 165-82 at 172.

<sup>139</sup> Alston, *Children, Rights, and the Law* at vi.

child, as opposed to the rights of the representative parent, lawyer or otherwise. This would avoid manipulation of the child, in such cases as those brought before the HRC by parents, in custody cases, where the parent-author claimed to be representing the child, whilst in fact the child's interest was only invoked to bolster the parent's claim.

As a safeguard, the CRC Committee may be required to check with the child (subject to her understanding) that a complaint submitted on her behalf reflects her views and that she wishes the author to act on her behalf. In cases where it is decided that the complainant-author is not submitting the claim on the child's behalf, consideration would need to be given as to whether the Committee still has discretion to consider the complaint. The protocol could also allow the possibly for different representatives.

## 7.6 Collective Complaints

Collective complaints can provide a complaints mechanism to the CRC with real difference and bite. Although not being possible before other treaty bodies, this novel procedure would seem to be supported primarily by the language employed by the Convention. An analysis of the terminology used in the CRC has provided incongruous results, being seen as either positive in advancing children's rights, or conversely as immobilizing them. For example, the use of the word "child" as a singular noun in the title of the Convention has been seen to render children invisible, despite its near universal ratification.<sup>140</sup> Some advocates, argues Abramson, "have picked up on the plural usage in the CRC, using 'the child' as a collective word, often turning it into the personification, The Child," the result of which is to "treat 2.5 billion people as an object."<sup>141</sup> This is seen then, as yet another "double' standard" as no similar treatment exists in the other fundamental international

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<sup>140</sup> Bruce Abramson, 'The Invisibility of Children and Adolescents: The Need to Monitor Our Rhetoric and Our Attitudes', in Eugene Verhellen (ed.), *Monitoring Children's Rights* (The Hague: Kluwer Law International, 1996), 393-402.

<sup>141</sup> Ibid. at 397.

human rights treaties.<sup>142</sup> However, on the other hand, this very usage of “the child” has been appraised by another writer as facilitating the unique way in which the CRC can be used to represent both the individual child’s interests, and that of the collective – neither being mutually exclusive:

[W]hile I am entirely in favour of collective analysis of the situation of children and of collective action for children’s rights, I do not like the idea of losing the capacity to defend the individual child [...] these two are not mutually exclusive. The language of the Convention is clear on that point [...]: “the child” may have individual and collective meaning at the same time. When legal action is taken, I think each individual can be an example for many others of how to defend a child’s rights.<sup>143</sup>

Thus, according to this line of reasoning, there would seem to be nothing in the general interpretation of the CRC as an instrument per se, to prevent collective complaints procedures on behalf of the “the child”. A collective complaints procedure – as initially envisaged by the drafters of the original OP to the CEDAW – would considerably broaden the accessibility of the complaints procedure to the CRC, which would be available to children (or their representatives) who can show they are victims of the alleged violations, to those who find it daunting because of procedural issues or fear of reprisals, such as children.

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<sup>142</sup> As opposed to the formulations: ‘The Universal Declaration of the Rights of the Human,’ ‘Convention on the Elimination of All Forms of Discrimination against the Woman,’ or the ‘Convention on the Rights of the Person with Disabilities.’ This form is seen as objectifying and thereby *essentialising* the subject of the treaty.

<sup>143</sup> Ferran Casas, ‘Monitoring Children’s Rights and Monitoring Childhood: Different Tasks?’, in Eugeen Verhellen (ed.), *Monitoring Children’s Rights* (The Hague: Kluwer Law International, 1996), 49-56 at 54.

## 8 Conclusion

“Human rights discourse is powerful. Decisions are made and lives are affected through its doctrinal, institutional, and rhetorical structures.”<sup>144</sup>

My purpose in this thesis was two-fold: to strengthen the philosophical underpinnings of children’s rights in international human rights law, which I have undertaken with reference to the broader notions embedded in rights theories. In so doing, I hope to have demonstrated that the Convention is only just a beginning and that “those who wish to see the status of and lives of children improved must continue the search for the moral foundation of children’s rights. Without such thinking there would not have been a Convention: without further critical insight there will be no further recognition of the importance to children’s lives of according them rights.”<sup>145</sup> Secondly, in arguing for the need for an optional protocol to the CRC, I have assumed what Karen Engle famously entitled a *doctrinalist* position, working “under the assumption that positive human rights law is authoritative, thereby reflecting a belief that there are no limitations to the discourse.” The limitations to the effectiveness of human rights to address the betterment of children’s lives is perhaps for another paper, but, as the doctrinalist position continues, having once “accept[ed] the enforcement gap, they accept that the discourse is limited in its ability to effectuate change, and they turn to strategies for making the law work.”<sup>146</sup> This is an attempt to strategise. I have worked from within the ‘core’ of the human rights framework – I have not discussed the tensions inherent in that said system, between

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<sup>144</sup> Engle, 'International Human Rights and Feminism: When Discourses Meet', at 607.

<sup>145</sup> Freeman, 'Taking Children's Rights More Seriously', at 69.

<sup>146</sup> Engle, 'International Human Rights and Feminism: When Discourses Meet', at 606.



discourse and practice and the challenges thus posed for protecting the interests of children, as opposed to other systems and discourses. Indeed, as highlighted by Engle, “The struggle to uphold the validity of human rights theory, law, or discourse in the face of what look like huge flaws is common.”<sup>147</sup> Though not explicitly attempting to ‘uphold its validity’ as a discourse in the face of all of its inconsistencies and problems in this thesis, I have nonetheless assumed that it is possible to work to improve the protection afforded by international human rights law, to children. In short, this is my attempt to patch:

The gaps between the core and the periphery and law and reality convince us that something is wrong. So we continually seek to fill or at least patch the gaps, generally with material from the core [...] We sense that our work at the periphery can only succeed if we can save the core and so, for the most part, we defend it.<sup>148</sup>

The CRC fills important gaps, and is progressive in the protection of the human rights of children. One can “note in this regard that global human rights instruments were not drawn up with children in mind, that they have been developed over a period of decades, and that as a whole they therefore contain a number of inconsistencies and certainly do not reflect current knowledge and experience with regard to children’s issues.” Any new instrument, here an OP to the CRC, should thus be drafted with a view to alleviating the inconsistencies in the treatment of the rights of children in the international human rights discourse, so that they do not fall prey to the same fate as those of women, as acutely described by Engle, whereby we “have fought hard to end injustices in the world with tools that are either unable or unwilling to repair the injustices. And yet, we continue the fight.” It is with this in mind that the need for children to be able to seek remedies pursuant to this distinctive instrument should be evaluated carefully – with a firm grounding and understanding at the theoretical levels with a view to sharpening the legal tools, the teeth of the CROC – and this evaluation should be a dynamic and ongoing process, as opposed to defining children’s rights with respect to a particular moment in history.

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<sup>147</sup> Ibid. at 610.

<sup>148</sup> Ibid. at 604-5.

## References

### List of Judgements/Decisions

- Bakhtiyari v. Australia* (2003) Communication No. 1069/2002  
*C. v. Australia* (1998) HRC Communication No. 900/1999  
*Fatma Yildirim (Deceased) v. Austria* (2007) CEDAW Communication No. 6/2005  
*Lovelace v. Canada* (1977) HRC Communication No. R.6/24  
*P. and his son M.P. v. Denmark* (1995) CERD Communication No. 5/1994.  
*Tadman et al v. Canada* (1999) Communication No. 816/1998  
*Vuolanne v. Finland* (1987) HRC Communication No. 265/1987  
*Waldman v. Canada* (1999) (Communication No. 694/1996)

### Treaties/Statutes

- ‘Elaboration of a Draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women’ (10 January 1996) UN Doc. E/CN.6/1996/10  
‘Comparative Summary of Existing Communications and Inquiry Procedures and Practices under International Human Rights Instruments and Under the Charter of the United Nations’ (21 January 1997) UN Doc. E/CN.6/1997/4  
‘Additional Views of Governments, Intergovernmental Organizations and Non-Governmental Organizations on an Optional Protocol to the Convention’ (18 February 1997) UN Doc. E/CN.6/1997/5  
‘Annotated Comparison of the Draft Optional Protocol and the Amendments Proposed Thereto with the Provisions of Existing International Human Rights Instruments’ (19 December 1997) UN Doc. E/CN.6/1998/7  
‘Reasons and timing to elaborate a communications procedure under the Convention on the Rights of the Child’ (10 December 2009) UN Doc. A/HRC/WG.7/1/CRP.4

‘Report of the Open-Ended Working Group to Explore the Possibility of elaborating an Optional Protocol to the Convention on the Rights of the Child to Provide a Communications Procedure’ (21 January 2010) UN Doc. A/HRC/13/43

‘Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development’ (18 March 2010) UN Doc. A/HRC/13/L.5

HRC Resolution 10/14, ‘Implementation of the Convention on the Rights of the Child and the Optional Protocols Thereto’ (26 March 2009)

CRC, ‘General Comment 1: The Aims of Education – Article 29 (1)’ (2001) UN Doc. CRC/GC/2001/1

HRC, ‘General Comment 13: Article 14’ (1984) UN Doc. HRI/GEN/1/Rev.1

HRC, ‘Report of the Open-Ended Working Group to Explore the Possibility of Elaborating an Optional Protocol to the Convention on the Rights of the Child to Provide a Communications Procedure’ (21 January 2010) UN Doc. A/HRC/13/43

Yanghee Lee, ‘Reasons and timing for a communications procedure under the Convention on the Rights of the Child’ (14 December 2009) UN Doc. A/HRC/WG.7/1/CRP.6

Paulo Sergio Pinheiro, ‘Reasons and Timing to Elaborate a Communications Procedure under the Convention on the Rights of the Child’ (10 December 2009) UN Doc. A/HRC/WG.7/1/CRP.4

#### Secondary Literature

(2010), ‘Complaints Mechanism: Timing and Feasibility Discussion’,  
<http://www.crin.org/resources/infoDetail.asp?ID=21444&flag=news>, accessed 14 May.

(2010), ‘Complaints Mechanism: Discussions begin at the UN’,  
<http://www.crin.org/resources/infodetail.asp?id=21436>, accessed 14 May.

(2010), ‘Complaints Mechanism: Unique Rights’,  
<http://www.crin.org/resources/infoDetail.asp?ID=21458&flag=news>, accessed 14 May.

- (2010), 'Meeting of the UN Working Group for the Communications Procedure, December 2009', (CRIN).
- Abramson, Bruce (1996), 'The Invisibility of Children and Adolescents: The Need to Monitor our Rhetoric and our Attitudes', in Eugene Verhellen (ed.), *Monitoring Children's Rights* (The Hague: Kluwer Law International), 393-402.
- Alston, Philip (1992), *Children, Rights, and the Law* (London: Clarendon).
- (1996), 'Establishing Accountability: Some Current Challenges in relation to Human Rights Monitoring', in Eugene Verhellen (ed.), *Monitoring Children's Rights* (The Hague: Kluwer Law International), 21-32.
- Beitz, Charles R. (2009), *The Idea of Human Rights* (Oxford: Oxford University Press).
- Byrnes, Andrew (1997), 'Slow and Steady Wins the Race: The Development of an Optional Protocol to the Women's Convention', *Am. Soc'y Int'l L. Proc.*, 91, 383-88.
- Byrnes, Andrew and Connors, Jane (1996), 'Enforcing the Rights of Women: A Complaints Procedure for the Women's Convention', *Brooklyn Journal of International Law*, 21, 679-797.
- Casas, ferran (1996), 'Monitoring Children's Rights and Monitoring Childhood: Different Tasks?', in Eugene Verhellen (ed.), *Monitoring Children's Rights* (The Hauge: Kluwer Law International), 49-56.
- Cohen, Cynthia Price (2004), 'The United Nations Convention on the Rights of the Child: a Feminist Landmark', in Michael Freeman (ed.), *Children's Rights* (Dartmouth: Ashgate).
- Detrick, Sharon, Doek, Jaap, and Cantwell, Nigel (1992), *The United Nations convention on the rights of the child: a guide to the "Travaux préparatoires"* (Dordrecht: M. Nijhoff).
- Dimitrijevic, Vojin (1993), 'The Monitoring of Human Rights and the Prevention of Human Rights Violations Through Reporting Procedures', in Arie Bloed, et al. (eds.), *Monitoring Human Rights in Europe: Comparing International Procedures and Mechanisms* (Dordrecht: M. Nijhoff in co-operation with the International Helsinki Federation for Human Rights), 1-24.

- Doek, Jaap E. (2002), 'Ways to strengthen the complaints procedures, particularly the individual complaint', *Stopping the Economic Exploitation of Children: New Approaches to Fighting Poverty as a Means of Implementing Human Rights?* (Hattingen, Germany).
- Eekelaar, John (1994), 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism', in Philip Alston (ed.), *The Best Interests of the Child: Reconciling Culture and Human Rights* (Oxford: Oxford University Press), 42-61.
- Engle, Karen (1991-2), 'International Human Rights and Feminism: When Discourses Meet', *Michigan Journal of International Law*, 13.
- Fortin, Jane (2009), *Children's Rights and the Developing Law* (Cambridge: Cambridge University Press).
- Freeman, Michael (1992), 'Taking Children's Rights More Seriously', in Philip Alston (ed.), *Children, Rights, and the Law* (London: Clarendon), 52-71.
- Gilchrist, Heidi (2001), 'The Optional Protocol to the Women's Convention: An Argument for Ratification', *Columbia Journal of Transnational Law*, 39, 763-83.
- Hathaway, Oona A. (2001-2002), 'Do Human Rights Treaties Make a Difference?', *Yale Law Journal*, 111.
- Keith, Linda Camp (1999), 'The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?', *Journal of Peace Research*, 36 (1), 95-118.
- Langford, Malcolm (2009), 'Closing the Gap? An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *Nordic Journal of Human Rights*, 27 (1), 1-28.
- Lanotte, Johan Vande and Goedertier, Geert (1996), 'Monitoring Human Rights: Formal and Procedural Aspects', in Eugene Verhellen (ed.), *Monitoring Children's Rights* (The Hague: Martinus Nijhoff).
- LeBlanc, Lawrence J. (1995), *The Convention on the Rights of the Child: United Nations lawmaking on human rights* (Lincoln, Neb.: University of Nebraska Press).
- Neumayer, Eric (2005), 'Do International Human Rights Treaties Improve Respect for Human Rights?', *Journal of Conflict Resolution*, 49 (6), 925-53.

- Newell, Peter (2007), 'Children's use of international and regional human rights complaint/communications mechanisms: Background Paper', *International Justice for Children* (Strasbourg: Council of Europe), 17.
- Nickel, James W. (2007), *Making Sense of Human Rights* (Malden, Mass.: Blackwell Publishing).
- Pitts, Lewis (1992), 'The Right to be Heard: The Child as a Legal Person', in Kathleen Alaimo and Brian Klug (eds.), *Children as Equals: Exploring the Rights of the Child* (Lanham, Md.: University Press of America), 165-82.
- Ritz, Kerri L. (2001-2002), 'Soft Enforcement: Inadequacies of Optional Protocol as a Remedy for the Convention on the Elimination of All Forms of Discrimination against Women', *Suffolk Transnational Law Review*, 25.
- Shelton, Dinah (2005), *Remedies in International Human Rights Law* (Oxford: Oxford University Press).
- Simmons, Beth A. (2009a), *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press).
- (2009b), 'Should States Ratify? Process and Consequences of the Optional Protocol to the ICESCR', *Nordic Journal of Human Rights*, 27 (1), 64-81.
- Taefi, Nura (2009), 'The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child', *The International Journal of Children's Rights*, 17, 345-76.
- Tang, Kwong-leung (2004), 'Internationalizing Women's Struggle against Discrimination: The UN Women's Convention and the Optional Protocol', *Br J Soc Work*, 34 (8), 1173-88.
- Torre, Emilia Della (2000), 'Women's Business: The Development of an Optional Protocol to the United Nations Women's Convention', *Australian Journal of Human Rights*, 6 (2), 181. <<http://search.austlii.edu.au/au/journals/AJHR/2000/25.html>>, accessed 28 April 2010.
- Van Bueren, Geraldine (1995), *The International law on the rights of the child* (Dordrecht: Martinus Nijhoff).

- (2008), 'Committee on the Rights of the Child: Overcoming Inertia in this Age of No Alternatives', in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press), 569-87.
- Veerman, Philip E. (1992), *The Rights of the Child and the Changing Image of Childhood* (Dordrecht: Martinus Nijhoff Publishers).

**Annex 1**

**UNITED  
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HUMAN RIGHTS COUNCIL

Eleventh session

Agenda item 3

**PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL,  
POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS,  
INCLUDING THE RIGHT TO DEVELOPMENT**

**Austria<sup>\*</sup>, Belarus<sup>\*</sup>, Bolivia (Plurinational State of), Bosnia and  
Herzegovina, Brazil, Chile, Colombia<sup>\*</sup>, Costa Rica<sup>\*</sup>, Croatia<sup>\*</sup>,  
Cyprus<sup>\*</sup>, Dominican Republic<sup>\*</sup>, Egypt,  
Finland<sup>\*</sup>, France, Germany<sup>\*</sup>, Honduras, Hungary, Italy,  
Kenya<sup>\*</sup>, Liechtenstein<sup>\*</sup>, Lithuania<sup>\*</sup>, Maldives<sup>\*</sup>,  
Malta<sup>\*</sup>, Morocco<sup>\*</sup>, Netherlands, Niger<sup>\*</sup>,  
Paraguay<sup>\*</sup>, Peru<sup>\*</sup>, Portugal<sup>\*</sup>, Romania<sup>\*</sup>, Slovakia, Slovenia, Spain<sup>\*</sup>,**

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<sup>\*</sup> Non-member State of the Human Rights Council.



**Thailand\*, Uganda\*, Ukraine, United Republic of Tanzania\*,  
Uruguay, Zimbabwe\*: draft resolution**

**13/... Open-ended Working Group on an optional protocol to the Convention  
on the Rights of the Child to provide a communications procedure**

*The Human Rights Council,*

*Recalling* Human Rights Council resolution 11/1 of 17 June 2009 on the Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure,

*Recalling also* General Assembly resolution 64/146 of 18 December 2009 on the rights of the child,

*Bearing in mind* paragraph 33 (p) of General Assembly resolution 64/146, in which the Assembly called upon States to ensure that child-sensitive procedures were made available to children and their representatives so that children had access to means of facilitating effective remedies for any breaches of any of their rights arising from the Convention on the Rights of the Child through independent advice, advocacy and complaint procedures, including justice mechanisms, and that their views were heard when they were involved or their interests were concerned in judicial or administrative procedures in a manner consistent with the procedural rules of national law,

*Noting with interest* general comment No. 5 (2003) of the Committee on the Rights of the Child, in which the Committee emphasized that children's special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights, and general comment No. 12 (2009), in which the Committee stated that the right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention on the Rights of the Child,

*Recalling* the view of the Committee on the Rights of the Child, expressed by its Chairperson in her oral report to the General Assembly at its sixty-third session, that the development of a communications procedure for the Convention on the Rights of the Child would significantly contribute to the overall protection of children's rights,

1. *Takes note* of the report on its first session, held in Geneva from 16 to 18 December 2009, of the Open-ended Working Group established under Human Rights Council resolution 11/1 to explore the possibility of elaborating an optional protocol to the Convention on the Rights of the Child to provide a communications procedure complementary to the reporting procedure under the Convention (A/HRC/13/43);

2. *Decides* to extend the mandate of the Open-ended Working Group until the seventeenth session of the Council, and also decides that the Open-ended Working Group shall meet for up to 10 working days and report to the Council not later than at its seventeenth session;
3. *Also decides* to mandate the Open-ended Working Group to elaborate an optional protocol to the Convention on the Rights of the Child to provide a communications procedure and, in this regard, requests the Chairperson of the Open-ended Working Group to prepare a proposal for a draft optional protocol, taking into account the views expressed and inputs provided during the first session of the Working Group in December 2009 and giving due regard to the views of the Committee on the Rights of the Child and, where appropriate, to the views of relevant United Nations special procedures and other experts, to be circulated by September 2010 in all the official languages of the United Nations, with the proposal for the draft optional protocol to be used as a basis for the forthcoming negotiations;
4. *Further decides* to invite a representative of the Committee on the Rights of the Child to participate in the Open-ended Working Group as a resource person and, where appropriate, relevant United Nations special procedures and other relevant independent experts;
5. *Requests* the Office of the United Nations High Commissioner for Human Rights to update and publish the report of the Secretary-General on the comparative summary of existing communications and inquiry procedures and practices under international human rights instruments and under the United Nations system, published on 22 November 2004 (E/CN.4/2005/WG.23/2), and to present that report to the Council at its fifteenth session;
6. *Requests* the Secretary-General and the Office of the High Commissioner to continue to provide the Open-ended Working Group with the assistance necessary for the fulfilment of its mandate, in accordance with General Assembly resolution 64/245 of 24 December 2009 on special subjects relating to the proposed programme budget for the biennium 2010–2011.